

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

JOANN WRIGHT HAYSBERT,

Plaintiff,

v.

BLOOMIN' BRANDS, INC., et al.,

Defendants.

CIVIL CASE NO.
4:20cv00121

TRANSCRIPT OF VIDEO CONFERENCE PROCEEDINGS
(Motions Hearing)

Norfolk, Virginia

March, 30, 2021

BEFORE: THE HONORABLE DOUGLAS E. MILLER,
United States Magistrate Judge

APPEARANCES:

CRANDALL & KATT

By: David A. McKelvey

and

HAYSBERT MOUTRIE, LLP

By: Nazareth M. Haysbert

Counsel for the Plaintiff

BANCROFT MCGAVIN HORVATH & JUDKINS PC

By: John D. McGavin

Counsel for the Defendants

1 (The hearing commenced at 10:32 a.m.)

2 THE CLERK: Joann Wright Haysbert v. Bloomin'
3 Brands, Inc., Civil Action No. 4:20cv121.

4 Are the parties ready to proceed?

5 THE COURT: If everybody could just kind of weigh in
6 verbally so I can make sure I can hear everybody.

7 Mr. McGavin, are you there?

8 MR. MCGAVIN: Yes. Good morning, Your Honor. John
9 McGavin, on behalf of the defendants. I'm ready to proceed
10 in today's hearing.

11 THE COURT: All right. Mr. Haysbert?

12 MR. HAYSBERT: Good morning, Your Honor. Nazareth
13 Haysbert, for the plaintiff. I'm also ready to proceed, Your
14 Honor.

15 THE COURT: And Mr. McKelvey is here. Good morning,
16 Mr. McKelvey.

17 MR. MCKELVEY: Good morning, Your Honor.

18 THE COURT: There are two lines for the court
19 reporter?

20 THE CLERK: Yes, sir. They're both for
21 Ms. Jeffreys. She just has a call-in line.

22 THE COURT: All right. That's fine.

23 We are here on various motions. I have a list. I
24 think a couple of them are pretty simple, and I plan to just
25 resolve them without argument, unless there's a need to

1 argue.

2 One was Mr. Haysbert's motion to expedite a
3 resolution of some of the pending motions. Perhaps the Court
4 didn't get to it quite as fast as Mr. Haysbert would have
5 liked, but, nonetheless, we're here, and I've made
6 accommodation for the discovery schedule that I think was
7 motivating that motion. So I plan to just indicate that that
8 motion has been resolved by the setting of this hearing and
9 the Court's actions on the discovery schedule, and so I'll
10 just have the minute entry reflect that the motion was
11 granted in part and resolve it in that fashion.

12 Is that acceptable, Mr. Haysbert?

13 MR. HAYSBERT: Yes, Your Honor.

14 THE COURT: Okay. So I'm going to grant in part
15 ECF No. 40 and resolve it by conducting this hearing and
16 making the rulings that are called for in the other motions.

17 The other one that doesn't appear to require much
18 discussion is Mr. McGavin filed a motion to quash several
19 depositions and subpoenas. The dates for response have all
20 passed. I intend to take up the issue of the discovery
21 schedule when we're done with this, and they can be
22 re-noticed, but I was planning to simply terminate that
23 motion to quash as mooted by the passage of time,
24 Mr. McGavin. Any problem with that?

25 MR. MCGAVIN: No, Your Honor.

1 THE COURT: Mr. Haysbert, any problem with that?

2 MR. HAYSBERT: No, Your Honor.

3 THE COURT: All right, then, I'm going to terminate
4 34 as moot.

5 All right. The next -- I think the next one --
6 well, did you-all have a particular order you wanted to
7 address these in? I think Mr. Haysbert wanted to address the
8 motion for leave to amend and the motion to remand, which are
9 kind of connected, before we wade into the other discovery
10 motions, including the motion for sanctions, the motion to
11 compel. I guess there are two motions to compel. So I was
12 planning to deal with the motion for leave to amend and the
13 motion to remand next.

14 Does that sound like a reasonable way to proceed,
15 Mr. Haysbert?

16 MR. HAYSBERT: That is my preferred way to proceed,
17 Your Honor, so thank you very much.

18 THE COURT: Mr. McGavin? They were filed first, and
19 it appears to make more -- now, I plan to address them. I
20 plan to give you-all some thoughts. The motions present
21 dispositive questions -- the motion to remand, at least.
22 It's not always completely clear whether a motion for leave
23 to amend is dispositive, but in this instance I expect the
24 motion for leave to amend will be dispositive, because
25 Mr. McGavin is opposing it on the basis of futility. So my

1 expectation is to hear your argument, share some
2 observations, write a report and recommendation, and then --
3 because that's all I have the jurisdiction to do.

4 But I did speak to the District Judge. She asked me
5 to weigh in on this issue, so that's my plan. So I can't
6 really give you a final answer on that, but I can give you my
7 answer on that, and then we'll proceed to address the
8 discovery motions.

9 MR. HAYSBERT: Awesome. Thank you, Your Honor.

10 THE COURT: Okay. So the motion for leave to
11 amend -- I have read everything. I'm happy to hear anything
12 else you want to say. I did look at the Supreme Court case
13 that you cited to me, *Krupski v. Crociere*, and some of the
14 other cases. Obviously, I mean, this is an issue that comes
15 up from time to time, the issue of relation back and also of
16 adding individual parties to a negligence action, so is there
17 anything you want to -- I have a few questions, but is there
18 anything you want to say, Mr. Haysbert, to amplify your
19 written filings? And I'm obviously considering them
20 together, because the motion to remand lives or dies on the
21 motion for leave to amend.

22 MR. HAYSBERT: Sure. Thank you, Your Honor, for the
23 opportunity to address the Court.

24 There was some recent information provided to us. I
25 want to say a couple of days after the close of the written

1 briefing we received supplemental discovery, and in that
2 supplemental discovery defendants, for the first time,
3 identified Lisa Crosby as a former managing partner, which
4 puts her on the same level of liability as Chip Chase, since
5 she apparently has ownership interest in the establishment as
6 well.

7 So the initial response provided to the Court was
8 that we were under a misunderstanding about the roles that
9 these two individuals played, and the defendants exacerbated
10 that misunderstanding by withholding information about
11 Mr. Chase and Ms. Crosby and the hostess, who still remains
12 unidentified, until, at the earliest, early February of this
13 year, when we were told they no longer had any relationship
14 with one of the defendants. You know, our belief is that
15 they must have known about the lawsuit; otherwise, how would
16 the defendants have known how to respond to plaintiff's
17 discovery requests?

18 We still have not received sufficient verification.
19 We've only received a verification for Bloomin' Brands'
20 second supplemental answer to interrogatories, which includes
21 a verification containing a signature that we don't
22 recognize. It does not include a printed name as well, so we
23 don't know who is authorizing any of the responses that we've
24 received so far from either of the defendants, whether it's
25 Lisa Crosby, Mr. Chase, or some other identified individual.

1 The defendants have repeatedly stated they were not
2 involved in the incident but that local employees were
3 involved. We've done this through discovery that we've
4 shared with the Judge, but they've not produced the franchise
5 agreement. The responses have been confusing and
6 contradictory regarding who is responsible for what occurred
7 that day.

8 So we believe that their arguments are unavailing.
9 The amendment is not barred by the statute of limitations.
10 Again, we just received, as of March 15th, information
11 regarding Lisa Crosby being a former managing partner of the
12 Outback Steakhouse. Same for Mr. Chase, in February of this
13 year, very late.

14 So we don't believe that this is a futile motion at
15 all. We believe that their discovery tactics have been in
16 bad faith, in fact, looking at the claims they're making.
17 We've been trying to discover facts necessary to assert
18 claims against Ms. Crosby and Mr. Chase for months --

19 THE COURT: Let me -- one of the things that the
20 *Krupski* case stands for and I think is correctly cited for is
21 that it's not so much what the plaintiff knows or how long it
22 takes the plaintiff to discover information that is going to
23 save a relation-back motion. What's important is what did
24 the new putative parties know, based on the information that
25 was available to them, within the 4(m) period that is

1 referenced in Rule 15.

2 And, so, while I'm sympathetic -- and I know the
3 issues are presented in the discovery motions regarding the
4 allegations of delay and your complaints about the timing of
5 the defendant's response. When I look at the original
6 complaint that was filed in this case, I have a hard time
7 finding any party in that case that could be confused for
8 either of the individuals or any of the three individuals
9 that you're seeking to name. And that, I think, is the
10 problem that you have.

11 It's not so much that the plaintiff took a while to
12 find out who did what and when, it's that the statute of
13 limitations protects these parties unless these parties --
14 Ms. Crosby, Mr. Chase, and Jane Doe -- knew prior to the
15 period that you had made a mistake in naming the two entities
16 that you named. And so I'm just having a hard time figuring
17 out how either of them would know that, since there were no
18 individuals named as parties in your original complaint.

19 MR. HAYSBERT: So, Your Honor, I think this boils
20 down to a couple of things.

21 Number one, if Lisa Crosby and Norman Chase are
22 managing partners or were former managing partners of the
23 Outback Steakhouse, they would have been owners of the
24 Outback Steakhouse, from what we can tell.

25 It defies belief that they would -- and the statute

1 is -- I'm sorry. The Chases should have known as well. It's
2 not that they actually had to know but that they should have
3 known, and that's a lower standard, to me. And so our
4 response or our position is they should have known that there
5 was a lawsuit pending because they were also co-owners of the
6 Outback Steakhouse and should have been sued for vicarious
7 liability.

8 THE COURT: But what is it -- I understand your
9 argument, but, again, I'm trying to understand what --
10 because you did name the owning entities, so what is it about
11 the -- right? You named Bloomin' Brands and Outback.

12 MR. HAYSBERT: Yes.

13 THE COURT: And these are companies that still
14 exist, right?

15 MR. HAYSBERT: That's correct.

16 THE COURT: They didn't fold or go away.

17 MR. HAYSBERT: That's correct.

18 THE COURT: So what I'm trying to figure out is what
19 is it about your original complaint or anything that happened
20 prior to the 4(m) period that would lead either of them to
21 conclude that you intended not to name the entities but to
22 name them as individuals?

23 MR. HAYSBERT: They -- well, I think the way you put
24 it -- it's that they had an ownership interest in the
25 establishment, and the intent was to capture the owners of

1 the establishment. We had no idea at the time and for a
2 while after, since defendants were recognizing her only as
3 the associate manager who was on duty at the time, that she
4 was an owner of the operation.

5 And our contention is that the people, the person,
6 the individual -- an individual has to sign these
7 verifications. When we sent out discovery, we sent out
8 discovery, I believe, in July of last year and -- or August
9 of last year and received discovery responses back by the end
10 of August. Those discovery responses were not verified. No
11 discovery responses since then have been verified by Outback
12 Steakhouse. We have no individuals signing these discovery
13 responses. Our belief is that they should have known,
14 because how else would those discovery responses have been
15 able to be generated?

16 Outback Steakhouse is not an individual person, an
17 individual breathing human being. The breathing human beings
18 are behind the Outback Steakhouse, and we have reason to
19 believe that Lisa Crosby and Norman Chase were also co-owners
20 of the business, should have been the ones verifying the
21 information, because who else would know the answers to the
22 questions we were asking except for these living, breathing
23 human beings? And also --

24 THE COURT: Let me ask -- go ahead. Did you want to
25 say something else?

1 MR. HAYSBERT: Well, in terms of being a co-owner of
2 the business, it defies belief that co-owners and managing
3 partners of the company would not have received notice that a
4 lawsuit had been filed against them.

5 THE COURT: Right, but it's not just notice that a
6 lawsuit was pending. They have to have known that but for a
7 mistake in identity they would have been not just involved or
8 mentioned in the complaint, but they would have been a party
9 to the lawsuit. And that's, I think, the hurdle that you
10 have; is that your lawsuit didn't name any individuals. It
11 didn't assert that an individual owner or an individual
12 employee had any responsibility as a party for what happened
13 to your client.

14 MR. HAYSBERT: We now know as of the March 15
15 discovery responses that managing partners of the Outback
16 Steakhouse are owners, co-owners, of the Outback Steakhouse.
17 We requested the franchise agreement and never received it.
18 We requested verified discovery responses and never received
19 them.

20 If they were an owner of this organization, they
21 should have known about the lawsuit, and they would have been
22 included as parties to the lawsuit but for an error in
23 knowing that they were owners. We didn't know at the time
24 that the managing partners were owners of the company, and if
25 we had known that, Your Honor, we would have included them as

1 individual parties to the lawsuit.

2 THE COURT: So let me -- there's a second tier of
3 difficulty for me in understanding why these two have been
4 named or sought to be named individually.

5 Your complaint alleges certain things on information
6 and belief, particularly with respect to Ms. Crosby, that she
7 had some personal involvement in some way with creating a
8 hazardous condition, and I want to understand what is the
9 source of that information and belief? I mean, you have
10 proffered a complaint that suggests that she either knew of a
11 spill and didn't clean it up or cleaned it up improperly.
12 And you have alleged that on information and belief, and that
13 means there must be something informing that allegation.
14 What is it that informs that allegation?

15 MR. HAYSBERT: Well, before I answer that question,
16 Your Honor, I think the -- I want to just say that based on
17 the discovery responses we received as of March 15, that
18 question is irrelevant, because she's now -- we now know that
19 she's an owner of the business. So it's an easier standard
20 to prove her liability with respect to this incident now that
21 we are sure -- and I've received discovery responses
22 indicating that she was a managing partner and owner of the
23 Outback Steakhouse at the time, much like Norman Chase. If
24 we had known that, then we would have -- you know, it would
25 not have been necessary to include her in the complaint in

1 the way that we did.

2 But to answer the question, Your Honor, what we did
3 was extrapolate from the limited discovery responses that we
4 were provided that there was an affirmative action that she
5 was taking that, you know, she was --

6 THE COURT: What were they? I mean, I've seen those
7 discovery -- I've seen some of those discovery responses, and
8 I can't figure out how you could allege in good faith that
9 she had -- even on information and belief, that she had
10 failed to clean something up or left cleaning fluid on the
11 floor. I just don't see any evidence that would lead you to
12 make that conclusion.

13 MR. HAYSBERT: Well, that wasn't the only allegation
14 we were making, it was or that she was controlling the
15 process and, you know, saw someone who did something and
16 didn't say anything, you know, just kind of didn't say what
17 she needed to say, because she was the operator and manager
18 of the restaurant at the time.

19 So, you know, the circumstance, based on the
20 information that we received, was that she had some sort of
21 affirmative conduct herself that bore some responsibility --

22 THE COURT: Again, when you say, "based on the
23 information we received," what information did you receive
24 that -- just because she was there, that she was physically
25 present?

1 MR. HAYSBERT: Well, not that she was just
2 physically present but that she was active. I mean, she was
3 literally putting together the claim form for the client
4 herself. She was providing the client with information to
5 follow up on.

6 THE COURT: After the fall.

7 MR. HAYSBERT: That's correct.

8 THE COURT: Right.

9 MR. HAYSBERT: She was on duty at the time. She was
10 responsible for what was occurring on the premises at the
11 time. This is according to their discovery responses.

12 THE COURT: Again -- but, I mean, ultimately, the
13 real core problem which you're going to have to deal with
14 eventually is that Bloomin' Brands and Outback says there was
15 nothing wrong with the floor. And so you keep saying it's
16 their responsibility to identify this or produce discovery,
17 but if they say nothing is wrong with the floor, then where
18 does that leave you?

19 That's what they're saying; there wasn't anything
20 wrong with the floor. And I'm asking you -- you've alleged
21 on information and belief that there was something wrong with
22 the floor. What is informing that belief? What information
23 are you relying on to conclude that there was anything
24 slippery on the floor?

25 MR. HAYSBERT: The client fell, Your Honor, and

1 smashed her head against the ground. And, unfortunately, we
2 have a situation here where the one thing that could make all
3 of this enlightening for us is gone. And that's the subject
4 of a different motion, but that's the centerpiece of what
5 we're discussing here.

6 THE COURT: We'll get to the video in a moment.

7 MR. HAYSBERT: Sure.

8 THE COURT: Again, I'm not trying to belabor this.
9 I am trying to get information, if there is any. And if
10 there isn't any, it gives me some pause, frankly. If you
11 just alleged, "Well, we know she fell, so the floor must have
12 been slippery," that's not a good-faith basis. If you have
13 no idea what caused her to fall, I don't think you can just
14 say, "Well, it must have been their fault."

15 MR. HAYSBERT: If there was nothing slippery on the
16 floor, why would a claim form be generated? Why would we
17 have discovery responses indicating that there was an
18 incident report put together for the incident in anticipation
19 of litigation? So we currently don't have access to any of
20 that information because, apparently, it's attorney work
21 product. There are a whole host of problems that we can't
22 just ignore on our way to excusing owners of this
23 organization from any liability for what has occurred in this
24 case. They have neatly -- if you -- if you -- I mean, I can
25 see it very clearly. They have neatly packaged this case in

1 such a way that they have been able to figure out every kind
2 of angle, including not verifying any discovery responses --
3 which is completely inappropriate and unjustified and a
4 violation of the Federal Rules -- in order to get us to the
5 point where you're even asking these questions. The
6 questions you're asking we've asked. We're not getting any
7 responses for them. What we have we've been able to
8 extrapolate upon information and belief.

9 She was the associate manager at the time. We've
10 asked for sweep sheets. What were the employees doing? When
11 were they supposed to mop? You know, were they required to
12 wear certain shoes? Were they wearing them on this
13 particular day? Who were the employees that were working on
14 this particular day? We served this discovery in August of
15 last year, and we don't have any responses to these questions
16 still.

17 What we have been able to obtain is that Ms. Crosby
18 is an owner of this organization, so we don't need to go to
19 the next step of trying to figure out what she did or didn't
20 do. Now we have the information. It conveniently came after
21 the close of all the briefing in this case so that nothing in
22 writing, you know, would be shared with the Court in a timely
23 fashion for this hearing.

24 But I can state unequivocally under penalty of
25 perjury this is the discovery responses that we received:

1 She's an owner of this organization. She should have known
2 about the lawsuit as an owner of the organization. And it
3 would be unfair and unjust to say that she wouldn't have
4 known about this, that there was an error. She knew that she
5 was an owner of this organization at the time of the
6 incident.

7 THE COURT: They're not arguing that she didn't --
8 well, they may be arguing, but that's not the basis of their
9 opposition that she had no idea that a lawsuit was filed.
10 The basis of their opposition is that she didn't know that
11 but for a mistaken identity she would have been named as a
12 party. That's the issue of relation back.

13 MR. HAYSBERT: And our argument, our position, now
14 that we have the discovery of March 15, that they
15 conveniently didn't provide us, and knew long prior to that
16 but didn't provide it even at the point that they filed their
17 opposition, is that she was an owner of the organization and
18 should have known about the lawsuit. Because in her capacity
19 as the owner of the organization she should have known, and
20 also -- and traveling further, that she would have been a
21 party to the action because we included all the owners that
22 we knew about. She would have been a party to this action if
23 we had known that she was an owner of the organization.

24 THE COURT: Okay. Let me hear from Mr. McGavin, and
25 then I'll -- and, Mr. McGavin, is Ms. Crosby an owner? What

1 does it mean to be a managing partner? Is she an owner? Or
2 how many owners --

3 MR. MCGAVIN: No, she's not an owner. And the
4 answer to interrogatory that Counsel is referring to says
5 that Lisa Crosby is a former managing partner and Chip Chase
6 is a former managing partner. We don't say she's an owner.
7 She's not an owner, she's a managing partner.

8 MR. HAYSBERT: Can you put that on the verification?

9 THE COURT: Just a minute, Mr. Haysbert. I'm going
10 to give you a chance at the end of Mr. McGavin's comments,
11 but please don't crosstalk with him.

12 MR. HAYSBERT: I'm sorry about that.

13 MR. MCGAVIN: So we've verified with Bloomin' Brands
14 and with Outback that the managing partners don't have an
15 ownership interest. So we've gone to Bloomin' Brands to
16 verify this, and we have confirmed that.

17 And this argument goes back to our initial set of
18 discovery and our initial motion to compel and plaintiff's
19 initial discovery in this case to us, in which they said,
20 "Please admit that you knew about the condition." Our
21 response was, "There's no condition. The floor was clean and
22 dry."

23 And then we filed in our discovery a motion to
24 compel plaintiff to tell us what was the defect, if you
25 recall, Your Honor, to which plaintiff had objected to

1 telling us what the defect was. And the Court ordered the
2 plaintiff to identify the defect, and the plaintiff said she
3 had no idea what the defect was because she blacked out.

4 So this effort to add to this case these two
5 individuals is not based upon any evidence that they were
6 involved.

7 I would also remind the Court that on June 22, 2018,
8 Mr. Haysbert wrote to "Chip Chase, managing partner of the
9 Outback Steakhouse." That's who he sent his spoliation
10 letter to. So if he believed that being a managing partner
11 exposed you to liability as an owner, then perhaps when he
12 filed suit on July 13, 2020, taking full advantage of the
13 tolling provisions of the coronavirus, he might have sued him
14 then.

15 Simply stated, Your Honor, there's no basis that's
16 been presented that somehow we've withheld the name or
17 identity of any property, number one, or, number two --

18 THE COURT: What about -- Mr. Haysbert raised the
19 issue of the fact that an incident report was prepared, that
20 there was some activity after Mr. Haysbert fell, and that
21 this might be evidence that would lead them to understand
22 what happened on the floor. Have you withheld that incident
23 report?

24 MR. MCGAVIN: We have. We've withheld that, yes,
25 Your Honor.

1 THE COURT: On the basis of attorney/client
2 privilege?

3 MR. MCGAVIN: That's right, yes, and prepared in
4 anticipation of litigation.

5 THE COURT: So it's a work product objection.

6 MR. MCGAVIN: Yes, that's right, Your Honor.

7 THE COURT: Okay.

8 MR. MCGAVIN: So it goes in to Risk Management for
9 them to consider, and then a month later we get a note from
10 Mr. Haysbert, June 22, his request to preserve information.

11 THE COURT: Okay. Does the -- I mean, if the report
12 says something about the condition of the floor, then he
13 would probably have -- it doesn't appear anybody has any
14 memory of this. He would probably have an argument that he
15 could not obtain that through another means. Do you know
16 what it says about the condition of the floor?

17 MR. MCGAVIN: I do, Your Honor, and it's going to
18 say that the floor was clean and dry. And Lisa Crosby, she
19 came to speak to Ms. Haysbert after she fell. There's no
20 dispute she fell, and she spoke to Ms. Haysbert. She
21 declined medical assistance and left.

22 So that's the extent of it. They have to submit
23 these reports when somebody has a fall, and that's why they
24 did it.

25 THE COURT: Okay.

1 MR. HAYSBERT: Let me get this right.

2 THE COURT: Just a minute, Mr. Haysbert. He's not
3 quite done.

4 MR. MCGAVIN: If I had some information that there
5 was some defect on the floor somewhere from some source, I
6 would disclose that. We have -- that's why we have
7 consistently said there is no defect, the floor was not wet,
8 there was no defect, and that's why we asked that specific
9 question, to know what Ms. Haysbert was contending was the
10 problem. Is it overly waxed? Is it somebody spilled a
11 drink? Is there a Bloomin' Onion on the floor? Any of those
12 things, in a run-of-the-mill slip and fall case -- okay, then
13 we can try to address that. But our evidence will be at the
14 trial of this case there was nothing like that on the floor;
15 there was no defect.

16 THE COURT: Okay.

17 MR. HAYSBERT: And, Your Honor, can I speak?

18 THE COURT: Let me just ask, is there anything else,
19 Mr. McGavin, before I hear from Mr. Haysbert in response?

20 MR. MCGAVIN: Your Honor, it just seems to me that
21 this is an effort to divest the Court of jurisdiction and
22 send the case back to state court.

23 And even if there was an amendment, what is it that
24 is going to be alleged that was supposed to be done
25 differently by these individuals? And there's nothing in

1 there. Although, apparently, I guess in the amended
2 complaint they're now trying to argue there was a soapy
3 substance, which is not what is in any of the discovery so
4 far.

5 THE COURT: Okay, Mr. Haysbert. What did you want
6 to say?

7 MR. HAYSBERT: Sure. Your Honor, so Counsel -- what
8 troubled me is that Counsel has made a number of claims or
9 observations, conversations with the owners of this store --
10 restaurant.

11 For example, when he talks about the fact that it
12 was clean and dry, there's no verification -- there's no
13 verified response supporting the truth of that statement.
14 It's simply Counsel saying it orally at a hearing. It has no
15 effect whatsoever without a verification. It means nothing.
16 It -- you might as well throw it out and say that it's not
17 true. We can't go that far; we don't know. There's no
18 verified response to that question. There's no verified
19 response to --

20 THE COURT: I meant to ask him a question about
21 that, and I neglected to. Let me get Mr. McGavin on the
22 record about that.

23 Mr. McGavin, who is verifying the defendants'
24 discovery responses?

25 MR. MCGAVIN: We have a new managing partner at the

1 property who would be signing for Outback. Bloomin' Brands
2 has already submitted their responses, which are signed, and
3 I would have to check with Ms. Johansen on this issue of
4 verification. I'm sorry. I know she's been working with
5 Outback at the location.

6 But as to this challenge, it's in our responses to
7 requests for admission, too, so that's binding on Bloomin'
8 Brands and Outback as well. So we stated this in requests
9 for admission affirmatively, not just denying but explaining.
10 So we haven't -- it's not just the answers to
11 interrogatories, it's also in the requests for admission,
12 which are not -- they're not verified, but they have the same
13 force and effect.

14 THE COURT: So you're going to get -- he says you've
15 gotten sworn responses from Bloomin' Brands; they're trying
16 to track down a verification from Outback. But --

17 MR. HAYSBERT: We don't have -- we don't have
18 the -- he's saying that they're sworn responses. We have an
19 illegible scribble of a signature without a printed name. We
20 have no idea who that person is. If we wanted to depose that
21 person, we couldn't, because we have --

22 THE COURT: Well, we have a simple problem,
23 Mr. Haysbert. We're not going to get hung up over someone's
24 signature not being able to be read.

25 MR. HAYSBERT: Well, we have to know who the person

1 is. We don't know who the person is.

2 THE COURT: Well, pick up the phone and ask them who
3 it is.

4 MR. HAYSBERT: Your Honor, I've asked, you know, who
5 is verifying these responses. We've included this in our
6 motions, and this is -- these are exhibits to our
7 applications for this information, and we haven't received
8 it.

9 THE COURT: Okay. We're moving off the subject of
10 this motion. We'll get to the discovery in a bit. And I
11 know you have a complete motion to compel, which we'll go
12 through in some detail.

13 MR. HAYSBERT: But I --

14 THE COURT: As to these issues, I'm still struggling
15 to figure out how either of these parties would have known
16 within the 4(m) period that but for a mistake in identity --
17 that is, that you actually intended to name -- and
18 Mr. McGavin says they are not owners. They have the title of
19 "Managing Partner," but they are not owners.

20 MR. HAYSBERT: Mr. McGavin is not a party to this
21 action. Mr. McGavin is not speaking under oath. Mr. McGavin
22 is not verifying these responses.

23 THE COURT: Mr. Haysbert, you're relying on him to
24 say they are owners.

25 MR. HAYSBERT: No.

1 THE COURT: You're relying on his discovery to say
2 they are owners, but you're not going to rely on his
3 discovery to say they're not?

4 MR. HAYSBERT: And now you see the problem that we
5 have; is that we're relying on discovery that we're getting
6 that isn't even verified.

7 And, Your Honor, they have to verify these
8 responses. How else -- why are we here? How are we going to
9 finish this discovery, period, relying on information we're
10 receiving from unverified --

11 THE COURT: I don't find this persuasive,
12 Mr. Haysbert.

13 MR. HAYSBERT: They're not verified?

14 THE COURT: I don't find this argument persuasive on
15 the issues that you are arguing to the Court. The issues
16 you're arguing to the Court are that these two individuals,
17 both of whom you knew about prior to filing the lawsuit --
18 Ms. Crosby is mentioned by name in the original complaint.
19 Mr. Chase received your letter within 30 days after the
20 accident happened. You knew about both of them.

21 Your original complaint did not name any individual
22 person, and I'm struggling to find out why it is either of
23 them should now, a year after the complaint was filed,
24 believe that in identifying two entities, Bloomin' Brands and
25 Outback, that you really intended to name them as

1 individuals. I don't understand how that could possibly be
2 understood by either of them within the Rule 4(m) period.

3 And I understand you have other complaints about
4 discovery, but that's not persuasive to me on the question
5 that I have to decide with respect to this leave to amend.
6 So is there anything else you want to say about the leave to
7 amend standard?

8 MR. HAYSBERT: Well, I will say this: We issued
9 subpoenas to Lisa Crosby and Chip Chase so that they could
10 both answer questions under oath about whether or not they
11 have an ownership interest in the company, when they knew
12 about the lawsuit, whether they knew that they were expected
13 to be sued, but for some error that occurred.

14 We set dates certain for those depositions. There
15 was a motion to quash. When we found out they no longer
16 worked for the company and we had to go get them ourselves,
17 then we filed the papers that we filed. And we sent Counsel
18 an e-mail taking off the calendar depositions because they
19 couldn't produce them.

20 It's all very convenient. We don't know when Lisa
21 Crosby and Chip Chase were no longer affiliated with the
22 Outback Steakhouse. We don't know whether or not they had an
23 ownership. We can't take Counsel's word for it. You know,
24 he's telling us through his discovery responses that there's
25 no camera above the hostess stand when we can clearly see it

1 ourselves.

2 So the Court should set dates for those depositions
3 shortly after this hearing so we can get the information that
4 we need from them. And this is in the interest of justice.
5 Because of the no verified responses that we've received so
6 far from Outback Steakhouse, we don't know who responded to
7 these questions. He's never identified a current managing
8 partner and how that person would know any of the information
9 that was occurring at the time of the incident, when we know
10 for sure Chip Chase was a managing partner and we now know
11 that Lisa Crosby was a managing partner as well.

12 THE COURT: But they're not owners, it's just a
13 title they give them.

14 MR. HAYSBERT: Your Honor, you're just taking his
15 word for it. It seems like --

16 THE COURT: You are, too, Mr. Haysbert.

17 MR. HAYSBERT: I'm not taking his word for it.

18 THE COURT: Okay.

19 MR. HAYSBERT: What I'm asking for --

20 THE COURT: I want to speak to local counsel.

21 Mr. McKelvey, your name is on this pleading. Your
22 name is on the pleading that alleges that Ms. Crosby
23 personally failed to clean up something or left a slippery
24 substance on the floor; that, on information and belief, she
25 had personal involvement in these actions. Can you tell me

1 what source of information the plaintiff is relying on for
2 that statement?

3 MR. MCKELVEY: Judge, this is based on my
4 recollection. And I'm not by any means saying that there is
5 no other information out there, but based on my recollection
6 there was -- the Court's question is kind of twofold.

7 One is the question of is there a -- was there a
8 response or a responsibility by someone, the person named, to
9 not -- to clean up, in other words. And there was a
10 discovery response that was issued by one of the two
11 corporate entities that said that it was -- that they were
12 supervising on site and that type of thing, so I have that as
13 far as their responsibility.

14 As far as the wet, slippery substance, I think
15 it's -- my assumption is that it's based on a -- either -- I
16 guess if she blacked out, it's based on what we would expect
17 to have happened. I'm not --

18 THE COURT: But on what -- I mean, why would you
19 have expected that to happen, other than the fact of her
20 falling? Is it essentially just the fact that your client
21 fell?

22 MR. MCKELVEY: The fact that she fell and -- Judge,
23 I would honestly defer to Mr. Haysbert on that. I mean, we
24 discussed it. He said that he thought there was a basis for
25 it.

1 MR. HAYSBERT: I'll tell you.

2 THE COURT: I've heard your answer, Mr. Haysbert.

3 MR. HAYSBERT: My answer wasn't complete, Your
4 Honor.

5 THE COURT: What else was it, Mr. Haysbert?

6 MR. HAYSBERT: So we have been trying to track down
7 the witness to the incident. I can't recall the name at the
8 moment.

9 THE COURT: That's not responsive to my question.
10 It's not responsive to my question that you don't know. My
11 question was you had to know something. You alleged on
12 information and belief that Ms. Crosby engaged in conduct or
13 failed to engage in conduct.

14 MR. HAYSBERT: I'm answering your question, Your
15 Honor. You have to let me finish.

16 What I'm saying is I had a private investigator go
17 and try and find one of the witnesses, including the witness
18 who was identified in defendant's discovery responses --
19 unverified discovery responses. She had a conversation with
20 this person over the phone, and this person was saying, "Oh,
21 you're talking about the old lady who fell on the slippery
22 substance."

23 THE COURT: Who said that?

24 MR. HAYSBERT: The person who was on the phone with
25 the private investigator.

1 THE COURT: What is that the private investigator's
2 name?

3 MR. HAYSBERT: I can give you that information, Your
4 Honor, and I believe I put it in the -- give me one second.

5 (There was a pause in the proceedings.)

6 MR. HAYSBERT: And I can have her submit an
7 affidavit under oath, Your Honor, to her conversation.

8 THE COURT: Well, it seems to me that's something
9 that should have been produced, if that's information that
10 you've gathered in connection with your investigation.

11 MR. HAYSBERT: Well, that was the "upon information
12 and belief."

13 THE COURT: Well, again, if you have information
14 that some person at Outback observed a slippery substance on
15 the floor, that's kind of important for everyone to
16 understand.

17 MR. HAYSBERT: Her name is Christina Perry, from a
18 company called People Hunter.

19 THE COURT: Okay. And when did Ms. Perry speak
20 to -- and Ms. Perry, you're saying, is going to submit an
21 affidavit saying that she spoke to a former employee?

22 MR. HAYSBERT: She spoke to someone that we were
23 able to identify on the witness list provided by defendants,
24 who indicated that they remember the incident and that the
25 person was an older lady and that she slipped -- fell on a

1 slippery substance. That's what she said her conversation
2 was.

3 When she tried to follow up with that person, that
4 person didn't respond to her phone calls after that point.

5 THE COURT: When did all this take place,
6 Mr. Haysbert?

7 MR. HAYSBERT: Give me one second, Your Honor. I
8 can tell you. She sent it to me in an e-mail.

9 (There was a pause in the proceedings.)

10 MR. HAYSBERT: The first e-mail that I got from
11 Christina was on September 28, 2020, who wanted to give me an
12 update on the witness, potential witness, Chris Robinson.

13 THE COURT: Chris Robinson is the witness's name?

14 MR. HAYSBERT: That's what is indicated here, but
15 the name could be -- yeah, that's what it says here. She
16 says, "Last week I reached out to a guy through text who
17 claimed he was Chris when he began the text, and by the end
18 he claimed he was the son of Chris. He said that his dad was
19 the one that witnessed the fall but was unable to talk
20 because he's in the Navy on a boat overseas. I did not
21 believe that he was telling me the truth and believed that it
22 was Chris. He was able to tell me in a few short texts about
23 the fall and knew exactly what I was talking about. The
24 phone number that I reached him on was a new number."

25 THE COURT: So you have somebody communicating with

1 a private investigator who says his father witnessed the fall
2 but the investigator doesn't believe him. She believes he's
3 really the person who witnessed the fall.

4 MR. HAYSBERT: He claimed he was the person at the
5 beginning of the text, and by the end he claimed that he was
6 the son of the person.

7 THE COURT: Okay.

8 MR. HAYSBERT: So I indicated in my filings the
9 difficulty that we've been having with the witnesses and this
10 particular witness in the case by indicating that we had a
11 private investigator working on this. But Christina will be
12 able to put under oath exactly what she heard, include the
13 text messages, and that's the basis upon which we believe
14 that Lisa was involved and the spill on the floor -- she's
15 the only person that we currently know was an employee and
16 was on duty at the time. We have no other names of any other
17 employees who were working at the time. We've gotten no
18 other information whatsoever about anyone else except for
19 Mr. Chase and Ms. Crosby.

20 THE COURT: Okay. All right.

21 MR. HAYSBERT: And we don't --

22 THE COURT: I don't need any more argument on that.
23 I would like you to prepare an affidavit for your private
24 investigator to sign, documenting her conversation with this
25 person as the basis for that allegation, and produce it to

1 Mr. McGavin. I'll give you 14 days to get that
2 accomplished.

3 All right. I don't need to hear any more argument.
4 As I said, I'm going to need to prepare a report and
5 recommendation, but I am going to be recommending that the
6 Court deny leave to amend. I do not believe that there is a
7 basis for either of these people to have understood, within
8 the period of time specified in Rule 15 and 4(m), that, but
9 for a mistaken identity, they would have been named as
10 parties in the litigation that was filed. And, therefore, I
11 do not believe any amendment adding them as parties would
12 relate back to that original. If it does not relate back, it
13 is barred by the statute of limitations, so I believe the
14 motion to amend should be denied as futile, and I'm going to
15 recommend that the motion for leave to amend be denied on
16 that basis.

17 Because the motion for leave to amend is the only
18 basis on which the plaintiff seeks remand, I'm going to also
19 recommend that the Court deny the motion to remand.

20 I'll try and get something together in writing
21 within the next ten days, and you'll have an opportunity to
22 object if you believe I've made a mistake, and you'll have
23 14 days to file those objections. The District Court will
24 review the objections, anything that's objected to, de novo
25 and make a separate determination, if I made an error.

1 MR. HAYSBERT: Your Honor, if I may, why not stay
2 the ruling on both, give us the opportunity to depose them or
3 get verified responses to the information that we've already
4 submitted to defendants so we can get the answers to those
5 questions? Because what I'm concerned about is you're
6 denying this motion despite the fact that we don't have any
7 verified responses, and we don't have adequate discovery in
8 this case, and we haven't had an opportunity to depose either
9 one of these individuals.

10 THE COURT: Again, it isn't based on what you knew.
11 That's what -- I mean, frankly, this *Krupski* case is very
12 helpful to me in understanding, because that's what -- you
13 know, the argument in *Krupski* was no relation back because
14 the plaintiff should have known this, and the plaintiff
15 didn't find out, and the plaintiff should have known, and
16 therefore they denied leave to amend because "the plaintiff
17 should have known" was not the standard.

18 The standard is whether the putative defendant
19 should have known. And even if you learn a whole bunch of
20 new information based on what was available to these
21 individuals, based on looking at your complaint and what
22 discovery has shown thus far about their role in the company,
23 there's no basis that either of them would have concluded
24 that you named, for example, Bloomin' Brands, LLC but really
25 meant to name an individual manager who worked for Bloomin'

1 Brands, LLC. There's just no -- there's no similarity.

2 The *Krupski* case is very instrumental of when this
3 happens. It happens when there are multiple entities or
4 possibly multiple individuals, although much harder with
5 individuals because each individual is a separate person and
6 has their separate role in what happened. You clearly
7 understood when you filed the original complaint that there
8 were individuals and that those individuals had
9 responsibility for carrying out the company's responsibility
10 to maintain a safe premises, but you chose to name the
11 company.

12 You didn't name any individuals. You could have
13 named them. You knew who one of them, Chip Chase, was, and
14 you knew who Crosby was. You may not have understood that
15 she had the title of Managing Partner, but that doesn't
16 really meaningfully change the analysis.

17 So I'm not going to stay my recommendation. As I've
18 said, you'll have an opportunity to object, and that will be
19 clear when I issue something in writing concerning the
20 decision that I --

21 MR. HAYSBERT: I just want to make one final
22 statement on the record.

23 We didn't get any substantive discovery responses,
24 still unverified, until October. The deadline to amend the
25 complaint to include individuals was September of last year;

1 all very convenient that we received discovery responses in
2 August of last year and then again in October that were
3 unverified. We need the opportunity to be able to ask the
4 question did Lisa Crosby or Chip Chase assist --

5 THE COURT: Mr. Haysbert, I've heard enough on this
6 motion, and if you can't stay focused on the remaining work
7 that we have to do, I'll ask Mr. McKelvey to step in and
8 argue on that for your client.

9 I know you're more familiar with the case, and I
10 want to hear what you have to say, but you're repeating
11 yourself, and I don't need to hear any more, all right?

12 MR. HAYSBERT: All right. Thank you, Your Honor.

13 THE COURT: All right. I think it's going to be
14 easiest to take up the motion for sanctions next with respect
15 to this video, and I'm going to -- rather than open up a big
16 can of worms, I just have some very specific questions for
17 each side about this motion.

18 The first question -- and we're now moving to Motion
19 No. 42, which is the motion for sanctions alleging spoliation
20 of electronic evidence; namely, security video or video from
21 the cameras that were installed at the Outback where the
22 accident happened.

23 So the first question that I have, Mr. Haysbert, is
24 the photograph of the camera above the hostess station. Did
25 you take that photograph?

1 MR. HAYSBERT: I did, Your Honor.

2 THE COURT: And when did you take it?

3 MR. HAYSBERT: Approximately two months after the
4 incident.

5 THE COURT: Okay. So is that going to be part of
6 your attestation, that it was taken two months after the
7 incident?

8 MR. HAYSBERT: Yes, that is, approximately two
9 months after the incident. I can't remember the exact day,
10 but it was approximately two months after the incident
11 occurred.

12 THE COURT: Okay. So let me ask you, Mr. McGavin.
13 You have indicated that this camera that is above
14 the hostess station was not present at the time of the
15 accident. Do you know when it was put in?

16 MR. MCGAVIN: I do, Your Honor. I have the
17 chronology. We've been working with the installer.

18 Our information is that in February of 2018 there
19 were six video cameras installed at the restaurant. Three
20 were placed in the interior; one covered the office, one
21 covered the to-go area, and the other covered the meat
22 freezer. There were three cameras on the exterior; front
23 door, back door, to-go area, parking lot. And in April
24 of 2019 there was an installation of a camera in the bar
25 area, and then in October of 2020 the entire video system was

1 upgraded and hard drive replaced.

2 And we do -- we've been -- I think we have gotten
3 the receipts for all that service work.

4 THE COURT: In April of 20 -- so you're suggesting
5 that the camera in the bar area -- I'm assuming the camera in
6 the bar area is the one that's depicted in the photograph
7 that Mr. Haysbert took.

8 MR. MCGAVIN: I think that's right, Your Honor,
9 but -- I believe that's right. And I don't know which view
10 the camera that Mr. Haysbert is talking about -- what that
11 covers, whether that covers -- is aimed at the to-go area. I
12 don't know that. And this is -- we have the service records
13 to present on this as well as to when cameras were purchased,
14 and this is what they've told us.

15 THE COURT: Okay. And have those been produced, or
16 were they sought in discovery?

17 MR. MCGAVIN: I don't know that they were sought,
18 Your Honor, and I think that the actual records from -- the
19 provider is a third-party provider. I think we have obtained
20 those as recently as last week.

21 So we've interviewed these folks, and that's the
22 basis of what I've represented to the Court. And I believe
23 that we received those supplemental documents last week.
24 Ms. Johansen has been working with that outside provider to
25 go ahead and get those actual service order documents,

1 receipts, and purchase orders.

2 THE COURT: Okay. Mr. McGavin, did anyone, as a
3 result of Ms. Haysbert's fall, look at the video after it
4 happened? Did anyone at Bloomin' Brands examine the video to
5 see, one way or another, whether it captured anything?

6 MR. MCGAVIN: Not at Bloomin' Brands corporate, they
7 did not. It was not until Mr. Haysbert's letter and he
8 started calling in to Bloomin' Brands, which is -- Bloomin'
9 Brands handles the risk management piece; Outback Steakhouse
10 of Florida operates the restaurant. So Bloomin' Brands is
11 the umbrella corporation. They have various restaurants
12 underneath that corporate name of Bloomin' Brands.

13 So the risk management piece goes up to Bloomin'
14 Brands, and, no, they did not look at it at the time. But
15 when the request came in to search for video and the letter
16 came in to Chip Chase, in terms of Bloomin' Brands they did
17 not -- or they searched for the video. It was not available
18 at that point.

19 THE COURT: I guess my question is Mr. Haysbert has
20 observed that there was a fall, they prepared an incident
21 report. Did anybody -- Ms. Crosby or anyone on the ground at
22 the Chesapeake Outback -- go to the security camera footage
23 and say, "I wonder if this captured what happened," and look
24 at it to see whether it captured what happened?

25 MR. MCGAVIN: I don't know the answer to that, so I

1 don't -- I don't think anyone was really, truly believing
2 that there was a lawsuit coming, I guess, at the local level.
3 I mean, they're just -- somebody fell, they offered her
4 medical assistance, she left, and then it goes up to Risk
5 Management at Bloomin' Brands, which requires it, in their
6 view, in anticipation of litigation anytime there's a fall.

7 THE COURT: Okay.

8 MR. MCGAVIN: I'd have to ask Ms. Crosby, Your
9 Honor, and I don't -- I don't know the answer to that, so I
10 don't want to overstate or understate what I actually know.

11 THE COURT: Okay. All right. Mr. Haysbert, I have
12 read all your papers, I understand your argument on this
13 motion.

14 I do think that there's a bit of a problem with the
15 timing of the preservation letter. It looked like it
16 literally went out on -- it appears on the 30th day following
17 the fall at something like 8:30 at night, from the receipts
18 that you submitted. So there wasn't any earlier
19 communication with them, right?

20 MR. HAYSBERT: That's not correct. In the same
21 motion I indicated that I had a conversation with the
22 managing partner.

23 THE COURT: Oh. So are you saying that the
24 conversation was before the letter?

25 MR. HAYSBERT: That's correct.

1 THE COURT: Well, I guess I need to understand what
2 you're attesting to, Mr. Haysbert, because I understood that
3 the letter was the first notice they would have received.

4 MR. HAYSBERT: No. I had a conversation with two
5 different people before the letter went out. One of those
6 individuals was Chip Chase. One individual was a -- I can't
7 think of the -- it was a man that I spoke with. I can't
8 think of the name, but I think he was affiliated with
9 Bloomin' Brands.

10 THE COURT: Okay. Well, I guess I need a little
11 more facts before I can rule on this motion. I'm going to
12 have to take it under advisement and ask you-all to
13 supplement the record.

14 Mr. McGavin, I'm going to ask you to confirm whether
15 either Mr. Chase -- whether anybody at Outback watched the
16 video before it was overwritten, because that, to me, would
17 be a relevant fact, if they watched the video as a result
18 of -- I'm not just talking about, you know, checking to see
19 if it was working properly, I mean did someone, after
20 Ms. Haysbert's fall, go back because of her fall and watch
21 the video.

22 And if they did -- if they didn't, then the answer
23 is just, "Nobody did that." If they did, then I guess I need
24 to understand what was on the video. But it's more important
25 to me to know just whether they did or did not go to the

1 video because of the fall and examine the video to see if it
2 captured her fall.

3 And I would also like you to supplement with
4 whatever facts you have indicating that this camera installed
5 in April of 2019 was the first time that a camera was in that
6 location at the hostess station.

7 And, Mr. Haysbert, if you're relying on the timing
8 of a call to Mr. Chase before the letter -- because your
9 affidavit includes date-stamped receipts for e-mail and
10 letters, so if you're relying on a call that preceded that,
11 you need to tell me when that call happened, and that needs
12 to be a matter of the record in a sworn statement. And I
13 guess we'll need to hear -- who knows? We may need to take
14 evidence on it. I don't know whether -- well, we'll have to
15 see what Mr. Chase says and what the investigation reveals.

16 I mean, the bottom line under Rule 37 is if they
17 never knew the tape was there, they never knew anything was
18 captured, they didn't have any obligation after 30 days to do
19 anything, and I think you're not going to win a motion for
20 sanctions.

21 On the other hand, if they did know, if they watched
22 the tape or somebody told them beforehand within the time
23 where they could have preserved it, then there may be an
24 argument. But it sounds like there's factual disputes about
25 when they knew and exactly what happened.

1 MR. HAYSBERT: So, Your Honor, I included a signed
2 sworn declaration indicating that I had a conversation prior
3 to the letters going out. I also included in that same
4 filing information I received from them, unverified, but
5 still information I received from them that they had
6 communicated with me and that that information was in the
7 incident report that we still haven't received. So we still
8 haven't produced --

9 THE COURT: Your declaration, Mr. Haysbert, says, "I
10 spoke by phone with the general manager or an agent or
11 employee, who confirmed the existence of working surveillance
12 cameras within the restaurant." That's what it says. It
13 doesn't say even who you spoke with, it doesn't say when you
14 spoke with them, it just says you spoke with someone who said
15 there were working cameras at the restaurant. That's what
16 you said.

17 MR. HAYSBERT: But I also included in the same
18 filing that there was information that they sent me in their
19 discovery responses indicating that they had communicated
20 with me and that this was part of their incident report, the
21 claimed filing. I can indicate where that is, if you would
22 give me a moment.

23 So it's not just me saying that I had a conversation
24 with them, it's the defendant saying the same thing.

25 THE COURT: The question is when did that

1 conversation take place?

2 MR. HAYSBERT: Your Honor, the best -- it would have
3 happened before the letters were sent out. I had the
4 conversation before the letters were sent out.

5 And then the other part of it is they prepared an
6 incident report apparently in anticipation of litigation that
7 will contain the dates that I spoke with them, and we have
8 been asking for this information and have not received it.

9 THE COURT: Okay.

10 MR. HAYSBERT: So don't take it from me. The
11 incident report should show the date that I actually had a
12 conversation with them, since they included that as part of
13 their discovery responses. We've requested the incident
14 report. We don't have it.

15 THE COURT: Was this incident report prepared after
16 Mr. Haysbert communicated with Outback, Mr. McGavin?

17 MR. MCGAVIN: No, no. What he's talking about is
18 we're referencing that in our claim notes Mr. Haysbert called
19 and was told that there was no video. So -- and that's what
20 we were trying to say, is that he started calling in -- I'm
21 checking when the first call was, but I --

22 MR. HAYSBERT: None of this --

23 THE COURT: Your brief says that he was told in July
24 that there was no tape.

25 MR. MCGAVIN: I think that's right. And I'm sure

1 that that's where we took it, is from the notes.

2 THE COURT: Okay.

3 MR. HAYSBERT: Your Honor, the notes were produced,
4 and there's no verification of this, even though we've
5 requested all of it.

6 THE COURT: I'm going to ask he -- I have asked
7 Mr. McGavin to produce a declaration identifying the
8 documents regarding the installation of the camera and any
9 information about whether the tape was reviewed prior to it
10 being overwritten.

11 MR. HAYSBERT: But wouldn't the incident report also
12 contain information of the claim documents?

13 THE COURT: I don't know whether -- I will -- if you
14 want me to look at the incident report *in camera*, I'll look
15 at the incident report *in camera* and determine whether it
16 contains any information relevant to this motion.

17 So I'm going to ask that you produce the incident
18 report, a copy of the claim notes, for my *in camera* review.

19 MR. HAYSBERT: Thank you, Your Honor.

20 MR. MCGAVIN: How do we do that, logistically,
21 Judge?

22 THE COURT: Just send it to me.

23 MR. MCGAVIN: Directly in an envelope and --

24 THE COURT: Just send it to me, to my attention, not
25 to the Clerk's Office.

1 MR. MCGAVIN: Since we do everything electronically,
2 do I send that by paper copy, rather than electronically, or
3 do I send that to Ms. Dodge, or what's the logistics of that?

4 THE COURT: You can do it either way. You can send
5 it just in an envelope addressed to me. That's probably the
6 simplest way. Just send it in an envelope and say, "For
7 *in camera* review."

8 MR. MCGAVIN: So, let's see. I'm looking at these
9 claim notes right now, Your Honor, so that I can figure out
10 how far along, because they continue to generate claim notes,
11 I'm sure, based upon my reports and so forth. So I'm just
12 checking, and I want to tell you what I'm going to send you
13 so we have an understanding.

14 It looks like the claim notes that might have
15 anything to do with this end September 10, 2018, and then
16 they restart in May of 2020, two years later. So what I will
17 do then, Your Honor, is just send the notes through
18 September 10, 2018, and then they restart in May of 2020.

19 THE COURT: Why don't you just send me through that
20 first entry in May of 2020.

21 MR. MCGAVIN: Okay. All right. I will.

22 THE COURT: Okay. I'm going to hold the motion for
23 sanctions under advisement until I get that supplement.

24 And again, Mr. Haysbert, if you want to point me to
25 something in your sworn statement that says you spoke to him

1 before then, I will look at it. I don't see that in the
2 affidavit that you have filed.

3 MR. HAYSBERT: I can supplement the declaration,
4 Your Honor.

5 THE COURT: If you would, do that in 14 days.

6 MR. HAYSBERT: Sure. I think the issue is I don't
7 recall the exact date and time of that phone call. I know it
8 was before I sent out the letter. So that's the concern I
9 have that could be alleviated by having the information that
10 they currently have, which is the date and time of the calls
11 they received.

12 THE COURT: Okay. Well, I'll -- do the claim notes
13 show a call on -- well, let me just look at the claim notes,
14 and I'll see what they say.

15 MR. MCGAVIN: Okay.

16 MR. HAYSBERT: I think the other issue, though, Your
17 Honor, is that with respect to the cameras, the incident
18 occurred in May of 2018. All the cameras that he discussed
19 would have been installed at that time. They do not account
20 for the camera that was above the hostess stand. They state
21 that there were only three cameras inside the restaurant; in
22 the to-go area, the office, and the freezer. They provided a
23 diagram of the fourth camera. Of all four cameras, they say
24 the fourth camera was installed in the bar area. That isn't
25 the camera that's observed right above the hostess stand. In

1 fact, the hostess stand camera is blocked from recording the
2 bar area, if you were to look at the pictures that I
3 included. So the bar is in a different area than the hostess
4 stand, very different.

5 THE COURT: Again, I can't tell what this camera
6 would have picked up, and my understanding is that it wasn't
7 present. So if you're going to submit a declaration that you
8 took this picture at some specific point in time, you would
9 need to supplement the record. Right now, you know, it's not
10 inconsistent with what Mr. McGavin has said, that this camera
11 was installed in 2019, after the fall.

12 MR. HAYSBERT: The camera above the hostess stand?

13 THE COURT: Yes.

14 MR. HAYSBERT: Okay. There's no way that camera
15 could have been installed in 2019, because I physically went
16 into the location within a couple of months of the incident
17 happening and took the picture that I showed there of that
18 camera.

19 THE COURT: Okay, I understand that. I understand
20 that's your position, but that was not in your declaration.
21 So it would be important for the Court to understand that, if
22 that is your sworn statement, that you took this photograph
23 within two months of the fall.

24 MR. HAYSBERT: And should I -- I mean, I can hire
25 a -- I think there's even a part of the camera that will tell

1 you exactly when the picture was taken. I don't know what
2 level of detail, but it will tell you exactly -- I want to
3 include this as an exhibit, if possible, because, you know,
4 it's important that the Court understand this picture was
5 taken within a couple of months of the incident happening and
6 not in 2019.

7 THE COURT: It's important for me to understand
8 exactly when it was taken, also, so whatever information you
9 have to demonstrate when the photograph was taken and where
10 it was taken would be helpful for me to understand.

11 MR. MCGAVIN: Your Honor, may I address the Court on
12 that?

13 THE COURT: Sure.

14 MR. MCGAVIN: May we have the original digital image
15 so that we can check the properties of it, rather than just
16 have a date stamp on it? Because the properties should be
17 digitally preserved and can be reviewed.

18 THE COURT: So can you e-mail the photograph in its
19 native format to Mr. McGavin?

20 MR. HAYSBERT: Yes, Your Honor, I'll figure out how
21 to get that done, and I'll do that. And I'll also do the
22 same thing in an amended declaration to the Court.

23 THE COURT: Okay, that would be fine.

24 Okay. So I'm going to hold the motion for sanctions
25 in abeyance until I get those supplements, and I've asked

1 you-all to prepare whatever you want to supplement the record
2 with within 14 days.

3 Okay. So the only two that we have left are the two
4 motions to compel. You know, these are -- well, with respect
5 to -- I think that's all we have left, right, Nos. 41 and 43?
6 Am I correct about that? 41 is the plaintiff's motion to
7 compel; 43 is the defendants' motion to compel.

8 MR. MCGAVIN: That's what I understand, Your Honor.

9 MR. HAYSBERT: And 44 as well, but yes.

10 THE COURT: I think 44 is just a brief. Maybe it's
11 been recorded wrong, but I think 44 is just a brief in
12 support of the motion to compel, which is 43.

13 MR. HAYSBERT: Okay.

14 THE COURT: So 43 -- I don't know that I need to
15 spend a lot of time on 43, because it seeks to depose the
16 plaintiff and have her submit to an IME. And that seems to
17 me to be a scheduling issue. Mr. Haysbert, obviously your
18 client is going to have to be deposed, and in a case like
19 this, where there's an allegation of a brain injury, it
20 doesn't seem like you object to her submitting to an
21 independent -- or a medical examination by a defendants'
22 doctor, do you?

23 MR. HAYSBERT: No.

24 THE COURT: Okay. So are you-all in a position to
25 just agree on some dates when that can happen? When --

1 MR. HAYSBERT: Your Honor, I never -- I have always
2 been forthcoming about dates. The only issue was that at one
3 point the client was stricken with COVID and needed to
4 recover. But we believe --

5 THE COURT: By the way, has she recovered? Is she
6 okay now?

7 MR. HAYSBERT: She's -- you know, as far as I know,
8 yes, she's feeling much better. But it's taken a while for
9 her to fully recover because of her age.

10 But I wanted to ask -- not ask, but the comment I
11 wanted to make on this is that we're trying to organize and
12 schedule all of the depositions that we've been requesting to
13 do if this case, including of Chip Chase, Lisa Crosby, the
14 persons most knowledgeable for Outback and Bloomin' Brands,
15 so we've been trying to schedule all of that together. So
16 the question for the Court, really, is we requested an
17 additional 90 days to get everything together. We've lost so
18 much time, and I don't know what the Court's ruling is going
19 to be on the motion to compel, our motion to compel, but
20 that's something that we need to have in the back of our
21 minds -- I have in the back of my mind -- is how much time
22 are we going to receive for additional discovery so we can
23 get everything scheduled appropriately?

24 THE COURT: Okay. Well, I think I'm going to have
25 to set some new discovery cut-offs as a result of the motions

1 that are pending and the decisions that are going to be made
2 and the recommendations that are going to be made, so I'll do
3 that.

4 My plan -- when was the plaintiff's original
5 discovery cut-off? Was it late February?

6 MR. HAYSBERT: No, it was March -- I want to say
7 our --

8 THE COURT: So it was the expert deadline that was
9 approaching?

10 MR. HAYSBERT: Yeah, there was the expert deadline
11 approaching, and then our deadline to serve additional
12 discovery, which I assume to include subpoenas and so on, I
13 believe, was March 6.

14 THE COURT: Okay.

15 MR. HAYSBERT: So we served the subpoenas before
16 then, but, you know, opposing counsel got back to us: "We're
17 not prepared; we need new dates." So we're happy to do all
18 of that, but we just need to know what time period we're
19 going to be dealing with so we can put it all together. And
20 we might have to request that the Court provide dates
21 certain, because it's been difficult to schedule dates for
22 opposing counsel's deponents.

23 THE COURT: Okay. Well, I'm inclined to just push
24 all of the dates the same -- in other words, keep them
25 separated -- the plaintiff 's dates are going to run before

1 the defendants' dates -- but just push everything 60 days.
2 And so that would push your expert disclosure dates out
3 60 days, your discovery dates out 60 days, and it would push
4 yours out 60 days, too, Mr. McGavin. And I think that's
5 justified by the difficulties that have been encountered in
6 discovery, and it's unlikely to impact when the case might
7 come to trial, given how civil cases are proceeding here. So
8 I'm comfortable just extending everybody's dates 60 days, and
9 that should give you time to do the discovery that remains to
10 be done and get these depositions taken and scheduled.

11 Mr. McGavin, are you going to have any issues
12 getting these folks available for deposition within that time
13 frame?

14 MR. MCGAVIN: I don't think so. I think the problem
15 that we had is that without any advance request we just
16 received notices and subpoenas. So --

17 THE COURT: I understand.

18 MR. MCGAVIN: And so we've got to have at least some
19 lead time to prepare and not just be expected to produce
20 people on Mr. Haysbert's schedule.

21 So we've got to work together, and that's why we
22 sent letters to Mr. Haysbert saying, "Hey, we've got to have
23 an IME; we've got deadlines." So I'm sure all those things
24 can be worked out, but it does take two to tango, so to
25 speak. So we look forward to cooperating, and we'll

1 schedule, we'll provide dates, but there has to be some
2 back-and-forth.

3 THE COURT: So here's -- with respect to the motion,
4 Motion 33, I am going to grant the motion to compel an IME
5 and to compel a deposition of the plaintiff.

6 I'm going to extend all the discovery dates and
7 expert disclosure dates by 60 days, keeping them the same
8 staggered way apart.

9 And I'm going to direct the parties to meet and
10 confer on dates for these depositions and the other discovery
11 that we're going to address in a moment and to agree on those
12 dates -- I'm not saying the depositions have to happen within
13 14 days, but I want you-all to confer and get the depositions
14 set within the next 14 days -- do you understand? -- so that
15 by the end of 14 days you'll know when these depositions are
16 going to take place.

17 MR. HAYSBERT: Well, Your Honor, our position is
18 that we've been requesting deposition dates since at least
19 late January of this year, early February of this year, and
20 we're consistently being pushed back. They've had our PMK
21 notice, deposition request, for a while now, so my concern is
22 that --

23 THE COURT: What is a PMK deposition?

24 MR. HAYSBERT: Sorry. The person most knowledgeable
25 on various issues for Outback and Bloomin' Brands. My

1 apologies for that.

2 So I don't want it to be a situation where we're
3 trying to negotiate dates 15 days before the discovery
4 cut-off again, because that doesn't help us, especially if we
5 don't get the information that we need. We need to be able
6 to come back to the Court and compel deposition testimony or
7 compel additional discovery.

8 THE COURT: Well, this really shouldn't be
9 difficult. I was giving you 14 days because I don't want to
10 have to sit here and look at your schedules and do this for
11 you. I mean, this is not something the Court should have to
12 baby-sit. If I have to, I will, but I don't think I should
13 be required to do it.

14 So if you want me to do it in seven days, I'll do it
15 in seven days, but I really don't want to have to be the one
16 who picks this. Because if I am the one who does it, this is
17 the way it's going to happen:

18 I'm going to order every lawyer in the case to give
19 me their calendar -- you, Mr. McKelvey, Mr. McGavin, every
20 associate on the file -- and say, "Let me have the
21 schedules." Then I'm going to pick who does the deposition
22 and when it occurs, and I'm going to decide those issues. So
23 you don't want me to have to wade into it, either of you.
24 You ought to both be able to agree on this. It shouldn't be
25 that difficult, okay?

1 MR. HAYSBERT: I love it. I mean, I'm going to
2 serve the subpoenas, and we'll see what happens.

3 THE COURT: What do you mean subpoenas? Why would
4 you need to subpoena these folks? They're going to produce
5 them. Well, no, the people who are not employees will need
6 to be subpoenaed.

7 You need to coordinate those dates with Mr. McGavin
8 and the other lawyers in his office. So produce --

9 MR. MCGAVIN: That's all I'm asking, Judge, is
10 before a subpoena goes out, run a couple of dates by us, just
11 as we will with Ms. Haysbert, to make sure the date we're
12 talking about matches her schedule and Mr. Haysbert's and
13 Mr. McKelvey's.

14 THE COURT: Okay. So that's the ruling with respect
15 to No. 43. Now let's talk about No. 41.

16 MR. MCKELVEY: Your Honor, I'm sorry to interrupt.
17 I had a question about the dates and the deadlines, and I was
18 wanting to bring it up with the Court now.

19 Since all this has happened my son has some surgery
20 scheduled in Boston the first week of June, and they're
21 telling me two to three weeks. It's right smack dab in the
22 middle of this. I thought it was going to be later. His
23 local doctor requested it be moved up, and that's the first
24 date we could get. The preop is the day after the pretrial
25 hearing, and then the trial is set for the third week. He

1 should be home that week; he may not. I'm planning to stay
2 up there. I didn't know how I go about -- if the Court wants
3 something formal, I can do it, but I just thought when we
4 were talking about these deadlines there might be a way to
5 address, you know, a continuance or moving it a week out. I
6 mean, I wouldn't need much time, but --

7 THE COURT: I think this trial is going to come off
8 from that June date, given the pending motion for leave to
9 amend and motion to remand and the discovery breather that I
10 have just ordered. I need to speak to the District Judge
11 about exactly what's going to happen with it, but I suspect
12 it's going to come off from that date.

13 MR. MCKELVEY: Hypothetically, I mean, if I haven't
14 heard anything should I follow back up? How long should I
15 wait before I follow back up with the Court on that issue, if
16 I haven't heard anything?

17 THE COURT: If you haven't heard that the date has
18 come off within, you know, the next 30 days, I would reach
19 back out, but I expect you will.

20 MR. MCKELVEY: Okay. Thank you, Your Honor.

21 THE COURT: All right. Now, I guess the first issue
22 on this motion to compel is, obviously, if the responses are
23 still unexecuted, they need to be executed.

24 So, Mr. McGavin, Mr. Haysbert says he still doesn't
25 have executed responses. You've indicated, I guess, that

1 some responses were executed; you're not sure by who.

2 MR. MCGAVIN: Bloomin' Brands has executed
3 responses, and I've gotten an e-mail from Ms. Johansen today
4 that we have Outback's signature for the current managing
5 partner, so she's executed, and we'll send that today. So
6 then all of our discovery should be fully executed.

7 THE COURT: Okay. Go ahead, Mr. Haysbert.

8 MR. HAYSBERT: Your Honor, that tells us nothing.
9 We've served at least three different sets of discovery in
10 this case. There's discovery that's gone back to August.
11 There were objections that haven't been executed. We have --

12 THE COURT: Well, the lawyers can execute the
13 requests for admission, right? The lawyer can execute the
14 request for admission. I'm assuming they did that; they
15 submitted it to you with an electronic signature.

16 MR. MCGAVIN: Yes, we did.

17 THE COURT: And the same with requests for
18 production. The lawyers can sign the requests for
19 production. They're the ones who are producing the material.

20 It's just the interrogatories that were
21 unexecuted -- were unsworn, right?

22 MR. HAYSBERT: Right. So that's three different
23 sets of interrogatories that we've submitted, the first going
24 back to August of last year. And that's the key one, because
25 we don't know when Lisa Crosby and Chip Chase were no longer

1 managing partners. We don't know who -- that was the main
2 discovery that we served when we were requesting all this
3 information. I can't understand how a new managing partner
4 would know it, but, nevertheless, that's what we served, and
5 I want to be sure that is what he's referring to as having
6 been verified and executed. If that was executed by the new
7 managing partner, then, you know, that's one thing.

8 THE COURT: Are they going to execute all the
9 discovery that's pending, Mr. McGavin?

10 MR. MCGAVIN: Yes, she's the person that Outback has
11 designated. And I don't know that Counsel has requested when
12 Chip Chase or Lisa Crosby separated from Outback. I don't
13 know if that's in the request or not. I can't answer that.
14 So if that was asked, I don't know.

15 MR. HAYSBERT: Well, one of the things that we did
16 ask for, Your Honor, was the subject franchise agreement,
17 because that's going to answer a lot of the questions that we
18 have and I think will bring back into our orbit the motion to
19 amend.

20 It's that franchise agreement that determines how
21 things worked between the parties, from what we understand,
22 so -- between the parties and the current nonparties, Lisa
23 Crosby and Norman Chase. We don't currently have that
24 document.

25 THE COURT: I really don't understand how the

1 franchise agreement is going to bear on who did or didn't
2 take care of the floor on the date that your client was in
3 Outback. I really have a hard time understanding how that
4 document could be relevant.

5 MR. HAYSBERT: The document is relevant for a host
6 of reasons. Predominantly, it determines -- it states who
7 has an ownership interest in the particular franchise
8 location.

9 THE COURT: But I understood you had the owner,
10 right?

11 The owner is one of the two entities that is in the
12 lawsuit; is that right, Mr. McGavin?

13 MR. MCGAVIN: Yes, Your Honor.

14 MR. HAYSBERT: That hasn't been verified, Your
15 Honor.

16 THE COURT: It's going to be verified, Mr. Haysbert.
17 You have the owners. They have not denied that they own the
18 premises. So one of these two entities owns this Outback
19 Steakhouse and is responsible for employing the people who
20 were at the Outback Steakhouse.

21 MR. HAYSBERT: But this entity that's saying that
22 it's the owner of the location is saying that it's not
23 responsible for what occurred. It's saying that it will not
24 provide me with all of the --

25 THE COURT: No, Mr. Haysbert. You're testing my

1 patience, because you're misstating the record in this case.

2 MR. HAYSBERT: How am I --

3 THE COURT: They are not saying that they are not
4 responsible. They are saying that nothing was wrong with the
5 floor. That's a different way of saying they're not
6 responsible. They are not --

7 Mr. McGavin, is the company saying that they have
8 been incorrectly named because some other entity is
9 responsible for running the restaurant?

10 MR. MCGAVIN: No. What we're saying is that
11 Outback Steakhouse of Florida is the party -- that that's
12 their defendant. Bloomin' Brands is the franchisor, it's a
13 corporate entity up above. Outback Steakhouse of Florida is
14 the entity that operates this location, and if there's a
15 defect in the floor that he identifies that should have been
16 cleaned up, it's Outback Steakhouse of Florida. That's the
17 party.

18 But as you correctly state, Your Honor, we don't
19 have any information of any defect on the floor, and to the
20 contrary. What Lisa Crosby has said throughout is the floor
21 was clean and dry.

22 THE COURT: Okay. I don't see any relevance to the
23 franchise agreement. I don't understand how the franchise
24 agreement could be relevant to the issues that are present in
25 this case, which is what was on the floor; if it was there,

1 who was responsible for cleaning it up. I don't see how the
2 relationship between the franchisor and the franchisee bears
3 on any of those questions.

4 MR. HAYSBERT: It bears on a whole host of questions
5 that are relevant to this action, Your Honor.

6 THE COURT: Name one, Mr. Haysbert. Name one.

7 MR. HAYSBERT: A whole host of them. There are a
8 number of -- and I just named one of the main ones.

9 It will -- it will put to rest the question of who
10 owns -- and I know -- I don't want you to get upset by this,
11 but we don't know if they're a hundred percent owner, we
12 don't know if they're 50 percent, we don't know who else owns
13 this particular franchise location. There are a number of
14 issues that we need to address with that franchise agreement,
15 so, yes, we requested it, and we expect to receive it.

16 THE COURT: Okay. I deny your motion to compel the
17 franchise agreement. I'm not going to order them to produce
18 the franchise agreement.

19 MR. HAYSBERT: Oh, wow!

20 THE COURT: I do not believe the franchise agreement
21 is relevant to any issues in this case.

22 MR. HAYSBERT: Your Honor, the Federal Rules are not
23 based on relevance with respect to getting responses to
24 requests for production of documents in the sense that it may
25 not be -- it may be relevant or it could lead to potentially

1 relevant information. And I believe that that information,
2 that franchise agreement, could lead to --

3 THE COURT: That's not what the case says.
4 Relevance is the cornerstone of discovery. Relevance is the
5 number one issue that you look to when you're ordering
6 discovery.

7 So I don't think you're right that discovery permits
8 you to ask for any document in order to potentially uncover
9 relevant information.

10 MR. HAYSBERT: We're not asking for any document,
11 we're asking for the central agreement between the franchise
12 location and Outback Steakhouse, which Counsel is saying is
13 the owner, but we have no verified responses indicating that
14 they are and who else might be.

15 So I think this is going -- I'll just stop.

16 THE COURT: Well, I've made a decision. I don't
17 believe that that document is discoverable. I don't think
18 you've articulated a basis why it would be relevant to the
19 issues that are present in this case.

20 It's not clear to me that ownership has any
21 relevance to the case. You've got the owners. You have the
22 owner. They've said that they were the owner. Why do you
23 disagree with that?

24 MR. HAYSBERT: Because, Your Honor, there are a
25 number -- and this isn't even an argument. We've submitted

1 all of the interrogatory responses that we received and the
2 request for production of document responses that we
3 received, and it is clear from those -- and I submitted a
4 spreadsheet that identified every single detail of every one
5 of the responses that we received, where it should be
6 clear -- it's clear to me --

7 THE COURT: Show me that. Where is that in the
8 record? Tell me where -- I didn't see any spreadsheet in the
9 materials that I reviewed, so I may not have read all of your
10 exhibits. So show me what you're talking about.

11 MR. HAYSBERT: Hold on just one second, Your Honor.

12 (There was a pause in the proceedings.)

13 MR. HAYSBERT: So Exhibit H and I.

14 THE COURT: Do you have a document number or the ECF
15 number?

16 MR. HAYSBERT: This would be Document No. 41.

17 THE COURT: 41-2?

18 MR. HAYSBERT: Hold on just a second. Let me
19 just...

20 (There was a pause in the proceedings.)

21 THE COURT: Yes, that's it.

22 MR. HAYSBERT: Document No. 41-2, yes, and this
23 would be Exhibit Number H, I --

24 THE COURT: Okay, I've got it.

25 MR. HAYSBERT: Okay.

1 THE COURT: I've got it.

2 Do you have that, Mr. McGavin?

3 MR. MCGAVIN: I'm sorry, Your Honor?

4 THE COURT: He's referring to a summary of the
5 request for production that he's seeking to compel.

6 MR. MCGAVIN: I have it, Your Honor, yes. It was
7 Exhibit J. Is that the one? Or I guess J is the request for
8 admissions.

9 MR. HAYSBERT: So the first one is H.

10 THE COURT: I've got it, H.

11 MR. HAYSBERT: And that's the request for
12 production.

13 THE COURT: Yes. The insuring agreement --

14 MR. MCGAVIN: I have it.

15 THE COURT: Is there an insuring agreement? I'm
16 looking at -- I'm walking down some of these objections.

17 So request 3 does ask for an insuring agreement. Is
18 there an insuring agreement, or is the entity self-insured?

19 MR. MCGAVIN: They're self-insured and then there's
20 excess above, and -- so I don't recall what the CSIR is, but
21 there's excess coverage up above the SIR.

22 THE COURT: Okay. Well, if the SIR is below the
23 amount sued for, then I am going to require that you produce
24 the insurance policy.

25 MR. MCGAVIN: Okay.

1 THE COURT: So that's Request No. 3.

2 MR. MCGAVIN: All right. Thank you.

3 THE COURT: Let's take up this issue of condition,
4 which is addressed in Request No. 4.

5 So this is part of the problem with these discovery
6 responses and the objections and the responses, is this use
7 of a defined term "the condition." I don't have -- well,
8 maybe I have it in some of this 212-page exhibit, but what is
9 "the condition" referring to?

10 MR. MCGAVIN: Are you asking me, Your Honor, or
11 Mr. Haysbert?

12 THE COURT: No, I'm asking Mr. Haysbert. What is
13 "the condition" referring to?

14 MR. HAYSBERT: The condition -- Your Honor, it's
15 been the same throughout the -- all of the discovery that
16 we've submitted, and it describes the floor and the
17 slipperiness of the floor itself.

18 THE COURT: Again, if the defendants take the
19 position that the floor was not slippery, that it was an
20 ordinary hardwood floor that was not defective in any way,
21 and you ask them to identify any complaint related to the
22 condition or a similar condition, then they don't have any
23 way to respond to that, because -- I guess unless there were
24 complaints related to a clean and dry floor.

25 Do you understand why that's difficult to respond

1 to?

2 MR. HAYSBERT: I don't think that that is exactly
3 the way that we worded the term "condition," Your Honor. The
4 way that we worded it refers to the state of the floor,
5 including but not limited to the grit, slipperiness, wetness,
6 oiliness, greasiness, or dirtiness at the subject location
7 where the incident occurred. So it refers to the state of
8 the floor, including but not limited to the grit and whatever
9 may have been on it.

10 THE COURT: Okay. So I guess what you're really
11 seeking is were there any other falls in this area within a
12 particular period of time.

13 MR. HAYSBERT: That's correct, Your Honor.

14 THE COURT: So let's frame the request, Mr. McGavin,
15 as were there any other falls as a result of the condition of
16 the floor in this area of the store within the last, let's
17 say, 18 months. Do you object to producing the identity of
18 people, if there were such falls?

19 MR. HAYSBERT: Why just 18 months?

20 THE COURT: Well, I'm just trying to frame some
21 reasonable period of time; 18 months, 2 years, some period of
22 time.

23 MR. HAYSBERT: We asked for 5 years.

24 THE COURT: I understand what you asked for.

25 MR. MCGAVIN: Do you want me to respond?

1 THE COURT: Yes, I want you to respond.

2 MR. MCGAVIN: The question is do I object to
3 producing any information about any falls within 18 months at
4 that subject location?

5 THE COURT: Or 2 years, something like that.

6 MR. MCGAVIN: Here's the problem, Your Honor, that
7 I'm having with this exercise:

8 We've asked the plaintiff to tell us what was the
9 defect, and in a premises case the question for the defendant
10 is, for example, if you have a problem with water being
11 tracked in from the outside or you have a location that's
12 next to the kitchen and the kitchen staff are tracking grease
13 out onto the floor, tell me what it is that I did wrong.
14 That's why we asked that question in our interrogatories.
15 What's the defect? Plaintiff objects, refuses to answer. We
16 file a motion to compel, and plaintiff's answer to
17 interrogatory in this case, under oath, as the record is now,
18 is, "I blacked out; I have no idea." So I'm defending a
19 straw man.

20 So if I go back and respond 2 years ago -- and I
21 don't know. I don't know if there are any falls at that
22 location or not, but let's say I go back and somebody says,
23 "Well, somebody spilled a Bloomin' Onion." Then plaintiff is
24 going to change the claim and say, "Well, there was a
25 Bloomin' Onion there for my fall, too." So it's incumbent on

1 the plaintiff to tell me what is the claim. Is it overly
2 waxed? Is it soapy? Did a waitress just spill a bunch of
3 drinks? I've done a lot of Outback cases over many years in
4 many locations, and in every case we're confronted with a
5 claim, this is what the defect is, and so I'm fighting a
6 shadow here.

7 So to make it relevant to this proceeding, it's not
8 just did somebody claim they fell, but tell he what it is
9 your claim is. What is your defect? We're now almost three
10 years from the date of the incident, and it's not incumbent
11 upon the defendant to say anything more than we have. The
12 floor was dry and clean.

13 So that's where I'm struggling here. I'm fighting
14 against an unknown enemy, so to speak, as to what we did
15 wrong.

16 THE COURT: Yeah.

17 MR. HAYSBERT: Well, one of the things that we have
18 coming, Your Honor, is this declaration or affidavit from the
19 private investigator who has been trying to find the
20 witnesses to the incident, who has already indicated -- I've
21 already indicated will share more information about what that
22 person said and the fact that that person stated that there
23 was a slippery substance on the floor.

24 The bottom line here is that the individual who fell
25 and had her head smashed against the flooring in the Outback

1 Steakhouse suffered a traumatic brain injury which is
2 permanent and cannot recall what was happening at that
3 exact -- she came to to a person's feet. What I think any
4 reasonable person would expect, communicating with people
5 over the phone, filling out claim forms, talking to a person
6 named Tristal, is that they would look for, identify, and
7 preserve the video of what happened so that we would all know
8 what happened on that fateful day, especially if it's going
9 to be difficult to get in touch with witnesses who were there
10 at the time.

11 THE COURT: Mr. Haysbert, it still doesn't answer
12 the question. I'm going to order some limited production on
13 this topic, but I am very mindful of the issue Mr. McGavin
14 has raised, which is that it is the plaintiff's burden. I
15 understand it may be a difficult burden in this case, and I'm
16 certainly sympathetic to your client's fall, but it's the
17 plaintiff's burden to show that the defendant was negligent
18 in some way, and so far I don't see any specific allegation
19 of negligence.

20 Nonetheless, I will order that the plaintiff produce
21 the identities and, if known, the -- the identity of anybody
22 who reported a fall in the Outback Steakhouse for -- in this
23 Outback Steakhouse -- for the two years preceding this fall
24 and, if known, what it was that caused that person to fall,
25 for two years preceding this fall.

1 But that's pretty broad relief, in light of a very,
2 very limited record, so I'm sort of bending over backward to
3 try and give you some information. I don't think it's going
4 to be all that useful to you, but I don't want you to feel
5 that I'm hamstringing your investigation and will look at
6 whatever this private investigator produces. Frankly, from
7 your description of it on the record, it didn't sound
8 compelling to me, and I doubt it is to you, either, or it
9 would have been a more central feature of your argument thus
10 far.

11 But I'm moving on.

12 MR. MCGAVIN: Judge Miller, before you move on,
13 would you permit us, if there are any of these -- and I don't
14 know -- to not produce the individuals' names who had the
15 fall? I think the issue is notice and whether it is of the
16 same alleged condition, whatever that is, that the plaintiff
17 encountered, without adding some of our customers to get
18 phone calls from Mr. Haysbert, which may be something that
19 perhaps they may not enjoy.

20 THE COURT: Well, for right now identify them by
21 their initials and the date of the accident and the
22 circumstances that were known to the Outback, and we'll look
23 at whether we need to go any further than that after we see
24 what's there.

25 MR. MCGAVIN: Thank you, Your Honor.

1 THE COURT: There are several of these objections --
2 I mean, several of the motion to compel arguments relate to
3 whether documents have been withheld, so let me just ask you
4 a blanket question, Mr. McGavin.

5 Other than attorney/client privilege or work
6 product, have you withheld documents on the basis of an
7 overbreadth argument or a vagueness argument? Are you aware
8 of documents that are responsive to these requests that you
9 have withheld?

10 MR. MCGAVIN: No, Your Honor, we are not withholding
11 documents. We have our claim notes, which I'll be sending to
12 you with the incident report, but nothing that I know of.

13 THE COURT: Okay.

14 MR. HAYSBERT: Your Honor, we know what information
15 hasn't been produced that still needs to be produced and has
16 been withheld. The most important thing was the sweep
17 sheets, who was working at the time. Because we don't have a
18 video and because it's very difficult to get the witnesses,
19 we need to know who was working at the time, and those people
20 could answer a lot of these questions that we currently have.

21 THE COURT: Okay. I hadn't gotten to that part, but
22 that is an important factor in the motion.

23 Does Outback really not have records of who was
24 working on the day this happened?

25 MR. MCGAVIN: That's what I've been told, Your

1 Honor, but that does sound surprising, I acknowledge that, so
2 we will go back and double check that. But I don't know what
3 a sweep sheet is, so --

4 THE COURT: Well, I mean, I know what it is. It
5 shows that if the floor is supposed to be cleaned on a
6 periodic basis that it's being done; that somebody has been
7 out there and looked and swept it or cleaned it or mopped it.

8 MR. MCGAVIN: Well, that's what I thought it meant.
9 In other words, a maintenance record as to when any
10 particular part of the floor was maintained or cleaned or
11 swept. But in listening to Mr. Haysbert, I'm not sure that
12 he's talking about that, as opposed to the identity of all
13 employees who were on duty that day.

14 So I don't want to misconstrue what we're discussing
15 and make sure I'm producing the correct document. I'm not
16 aware of any -- if sweep sheets are the maintenance logs,
17 "Joe Smith came through and swept the floor at 4:00," I'm not
18 aware of any of those documents available.

19 THE COURT: Okay. Well, I am going to order that
20 you -- if they're available, if you have them, that you
21 produce any documents related to the maintenance of the
22 Outback on the day in question, whether it's periodic, end of
23 day, beginning of day, any documents presently in the
24 possession, custody, or control of either defendant related
25 to the maintenance -- and I'm going to say anyone. I mean,

1 if they're there, it's not that burdensome to produce them.

2 So any maintenance at the Outback on the day in
3 question. And I also don't think it's overbroad to request
4 the identity of everyone who's working during the shift when
5 Ms. Haysbert fell. So anyone who was in the store -- the
6 restaurant on the day in question at the time Ms. Haysbert
7 fell, if either defendant has access to those records, I'm
8 going to require that they be produced, first and last names.
9 And we'll see who's there. You may have to provide contact
10 information, if these folks aren't still with Outback.

11 But it is puzzling why they don't have that
12 information. That does seem like something that should have
13 been produced.

14 MR. MCGAVIN: I can only say we've investigated that
15 and tried to get it. This is what we've been told, but it
16 bears another swipe at that, for sure.

17 THE COURT: Okay. I'm going to give you 14 days to
18 file a supplement, and if the supplement is they don't have
19 them, then I'd like a little explanation about what their
20 record-keeping policy is regarding -- at least regarding
21 who's working there.

22 MR. MCGAVIN: Okay.

23 THE COURT: Because it seems odd that they wouldn't
24 have some payroll record of who worked when that could show
25 who was on duty at the time.

1 MR. MCGAVIN: All right.

2 THE COURT: Okay. So that takes care of -- that is
3 granting relief as to request 11 and 12.

4 13. I'm not going to order any additional -- you've
5 produced some job description type documents?

6 I mean, the core of the problem is you don't know
7 who was there; is that right, Mr. Haysbert?

8 MR. HAYSBERT: That is the core of the problem, but
9 everything kind of builds from there. We need to know what
10 the responsibilities were for these employees to know whether
11 they were compliant, the policies. We need to know whether
12 they were compliant with the policies at the time of the
13 incident, so we've requested information as well, and we
14 don't know that we've received everything. We've received a
15 couple of pages of documents, but we don't -- there's no like
16 response saying, you know, "We've responded to Request No. 9
17 with this particular document," so we have no idea, which is
18 why I think it's completely appropriate to ask if they've
19 sent over everything. But even what we have received, we
20 don't know what it's responding to, in terms of the requests
21 we've made.

22 THE COURT: Okay. I have looked through the rest of
23 the requests that are outlined on your Exhibit 8, and I think
24 that the discovery that I've directed is an adequate
25 supplement, and I am going to order that production.

1 I'm moving on to interrogatories --

2 MR. HAYSBERT: Before we do, Your Honor, I just have
3 one comment or request.

4 We don't know whether or not there was written
5 statements provided by anyone from the Outback Steakhouse,
6 and it seems to be contradictory. On one hand, you know,
7 they include in their initial disclosures there was a
8 witness, but on the other hand they indicate that they don't
9 have any statements or they know a person was a witness.

10 THE COURT: You would obviously be entitled to
11 statements if they have them, but in reading their response
12 to your Request No. 6 it says there have been no statements
13 obtained, that they did not take any statements.

14 Is that right, Mr. McGavin?

15 MR. MCGAVIN: That's correct, we don't have any
16 statements.

17 THE COURT: Okay.

18 MR. MCGAVIN: If I go -- now, obviously, if I in my
19 process secure a statement with a private investigator or
20 whatever, that would be part of my work product. But even on
21 that, I don't have any recorded statements even now.

22 THE COURT: So there are not any statements. That's
23 what they said.

24 And you're not withholding any statements on the
25 basis of work product?

1 MR. MCGAVIN: No, not yet. If I can find this
2 Mr. Robinson and get a statement from him, maybe, but, you
3 know, that -- the first I've heard today is that there was a
4 private investigator attempting to interview him.

5 THE COURT: Okay. Now I'm moving on to the
6 interrogatories.

7 I mean, Request No. 1, that's really the core issue,
8 isn't it, Mr. Haysbert: "Do you contend you did not have
9 actual knowledge?" They don't believe there was any
10 condition. You know, how can you have or not have knowledge
11 of something that you don't believe existed?

12 MR. HAYSBERT: Verify it.

13 THE COURT: All right. They're going to produce
14 verified answers. So that's the only issue. Their
15 verification will address -- I think, otherwise, their
16 response is adequate for Interrogatory No. 1.

17 MR. HAYSBERT: It is, but what we're missing -- the
18 only thing, I think, is the context of the fact that we don't
19 currently have a lot of information. We don't have a video,
20 we don't have employees, we don't have witnesses, so I'm
21 just -- within that context, yes. Then as long as these are
22 verified, we can move on from that and go on to other
23 business. But there's a lot in the background, and I'm sorry
24 to waste the Court's time.

25 THE COURT: No, I mean, I understand your concern,

1 and the issue of the employees is very puzzling. We'll try
2 to get to the bottom of that.

3 The video -- I do not expect a big change in the
4 video. I don't expect them to suddenly find a video. I
5 guess there's an issue about Rule 37 and whether you can show
6 that they, you know, destroyed it or allowed it to be
7 overwritten with knowledge of its relevance. But, you know,
8 you keep saying, "Oh, there's video, there's video," or,
9 "There should be video," but I think if there had been video,
10 they would have produced it.

11 MR. HAYSBERT: No, Your Honor, the concern really is
12 kind of two parts.

13 Because we've actually gotten some discovery
14 responses, we now have an issue whether or not the camera
15 that's situated right above the hostess stand that would have
16 captured the incident was actually there at the time of the
17 incident. And I'm contending that it was because of, you
18 know -- and they're contending that it wasn't at that time.

19 So that's going to be an issue that's easily cleared
20 up, but, again, it leads into the central question: "Well,
21 how is it you missed the camera in the center of the
22 restaurant, right above the hostess stand?" And they're
23 indicating through Counsel that there was no camera there.
24 It boggles the mind, but, again, that's something --

25 THE COURT: There's a disconnect in that evidence

1 that we may have to get to the bottom of in some future
2 proceeding, but I've already ordered some supplemental
3 production on that.

4 MR. HAYSBERT: Sure. Thank you, Your Honor.

5 THE COURT: The safety guidelines and procedures --
6 I'm looking at Interrogatory No. 6 -- you have produced
7 those. It looks like there was some production of the
8 cleaning process and the standard practice in the restaurant
9 from maintaining the floors.

10 MR. MCGAVIN: Yes, Your Honor, we have produced the
11 documents that would pertain to maintenance, cleaning,
12 et cetera, for the floor.

13 THE COURT: Okay. So it looks like your main issue
14 with regard to this is who are these people doing it, and
15 I've already ordered that if it's available, he's required to
16 produce that information.

17 I'm not sure I understand your motion to compel on
18 Request 8, that the issue about shoes is contradictory to
19 Request for Admission 23. Are you referring to the original
20 answer or the supplemental answer; do you know, Mr. Haysbert?

21 MR. HAYSBERT: They -- can you give me just one
22 second, Your Honor, to go back to the request for admission?
23 I'm not currently looking at it, but I know there was a big
24 issue with this one, if you wouldn't mind just granting me a
25 few moments.

1 THE COURT: Okay.

2 (There was a pause in the proceedings.)

3 THE COURT: Do you have anything, Mr. Haysbert?
4 Because I want to get through the rest of these.

5 MR. HAYSBERT: My apologies, Your Honor. I'm only
6 seeing the response where they indicate that discovery was
7 pending.

8 THE COURT: Okay. Well, in any event, it appears
9 that they do wear special shoes, so they've supplemented.
10 I'm not going to order any further supplement on that
11 question.

12 The next issue presented by Interrogatories 11 and
13 12 is, basically, are there -- it's really 10, 11, and 12,
14 describing how the defendants respond when there are
15 incidents. There was an objection to 11 because Bloomin'
16 Brands was not involved; it said its employees were involved.

17 Lisa Crosby is the person who was involved; is that
18 right, Mr. McGavin?

19 MR. MCGAVIN: Yes, Your Honor.

20 THE COURT: Was anyone else involved, that you're
21 aware of from investigating the incident?

22 MR. MCGAVIN: Not to my knowledge, Your Honor, no.

23 THE COURT: Okay. So I'm not going to order any
24 further production on these interrogatories. You're going to
25 depose Ms. Crosby, and you can ask her about what she did and

1 how she did it and whether she followed their procedures, and
2 I think that's an adequate response.

3 MR. HAYSBERT: Well, the question I did have is when
4 they say they were not involved, what precisely does that
5 mean?

6 THE COURT: I'm assuming it just means that the
7 corporations weren't involved; that it was employees of the
8 corporations that were involved. Is that right, Mr. McGavin?

9 MR. MCGAVIN: Right. So when you have an incident
10 in Outback, it's the local manager on duty who is responsible
11 to get the person's information, see if they need medical
12 care, call 911, if that's what they want, and then report
13 that to Corporate, which would be Bloomin' Brands.

14 But it's Outback Steakhouse that runs the
15 restaurant, and that's who Ms. Crosby was responsible to, as
16 the managing partner on duty at the time, and so she is the
17 person that's tasked with talking to someone who has had a
18 fall, or is dissatisfied with their meal, or whatever.

19 THE COURT: Okay. Again, I'm not ordering any
20 additional production with respect to that interrogatory.

21 Interrogatory No. 17 asked for the contact
22 information for a person who I think you've now identified as
23 Trystal Hall. Have you provided contact information? She's
24 not an employee any longer, right?

25 MR. MCGAVIN: I don't believe she's still an

1 employee with Bloomin' Brands. She was in the Risk
2 Management team, and I don't know -- I can't remember if
3 she's gone. I think so, but I don't want to --

4 THE COURT: Well, what Mr. Haysbert has related in
5 his summary is that you identified her and said she was a
6 former employee. He says you didn't provide her contact
7 information. So if you're not going to produce her, I think
8 he's entitled to try and contact her himself.

9 MR. MCGAVIN: Okay. I just -- she's in the Claims
10 Department, Your Honor, so she's not -- she's not a -- she's
11 not on the floor. This is like my claims person is John
12 White, and you're going to see in the claim notes there's
13 claims people. So she's at Bloomin' Brands taking intake on
14 a claim. So that's -- I don't know -- he's not going to -- I
15 do not believe he should be contacting her or taking her
16 deposition on claims efforts.

17 THE COURT: Okay.

18 MR. HAYSBERT: Your Honor, I disagree
19 wholeheartedly. They are making the claim that my client was
20 not contacting -- or was not being responsive to Tristal
21 Hall, which is absolutely incorrect. She was trying to
22 communicate with her. Tristal and her did have a
23 conversation. My thought is that there is some helpful
24 information to be gleaned from Tristal Hall about the
25 conversation she had with the client. The client may have

1 been able to provide some information to her at that point
2 that she no longer remembers. I don't know. But that's -- I
3 mean, I think it would be helpful to this case to depose her
4 and get from her the communication she had with the client
5 and what she did in terms of the claim.

6 THE COURT: Okay. Well, I don't know whether --
7 you're just talking about factual information; that somehow
8 she might have information factually that might inform what
9 happened to your client?

10 MR. HAYSBERT: That's correct, Your Honor. She'd
11 have a ton of information regarding the --

12 THE COURT: Are you asking to depose her?

13 MR. HAYSBERT: Yes, Your Honor.

14 THE COURT: I don't know what the deposition is
15 going to be, but --

16 MR. MCGAVIN: It's going to be a fight, Your Honor.
17 You're talking about taking the deposition of somebody in the
18 claims department for a self-insured entity, and --

19 MR. HAYSBERT: She --

20 MR. MCGAVIN: Excuse me, Mr. Haysbert. If you don't
21 mind, I'll finish.

22 I strongly object to this. And what difference does
23 it make? We're not calling her as a witness. She didn't
24 take a recorded statement. She had some contact, apparently,
25 with Ms. Haysbert about this, trying to find out, "Are you

1 okay," or any follow-up. And what is the possible benefit of
2 injecting that into this case? It's information which is
3 just as easily known to the plaintiff as it is to the
4 defendant as to what the plaintiff said. It's just an
5 unnecessary fishing expedition, and, frankly, based upon the
6 course of this discovery, it's going to end up in a fight.
7 It's not going to be --

8 THE COURT: I'm concerned about it, too. I'm not
9 inclined to order the deposition until I see some of the
10 claims stuff and see something in there that suggests she has
11 some separate factual information. So I'll revisit the
12 question after I look at the incident report and the claim
13 notes, but I'm not going to order them to produce a claims
14 person or a risk management person for a deposition, unless
15 there's some reason to believe that she has information that
16 wouldn't already be available to your client.

17 MR. HAYSBERT: That's what we're saying, Your Honor,
18 that she might have some information that is not available to
19 my client currently. You know, I don't want to, you know,
20 overstate this, but she has suffered a permanent traumatic
21 brain injury and does not recall many of the events
22 surrounding the incident. And it's unfortunate, but we're in
23 this position, as with any TBI like it, where we need to have
24 as much information as we can from other sources.

25 THE COURT: Well, I'm not going to order it at this

1 time. I'll take a look at what will be produced to me
2 *in camera*. If it appears she has some kind of factual
3 information, then I'll consider whether to order her to be
4 deposed. I want to move on.

5 So Chris Robinson is identified in discovery. This
6 is a person you identified, Mr. McGavin?

7 MR. MCGAVIN: We had his name, and we gave it to the
8 other side. We've never been able to speak to him.

9 THE COURT: Okay.

10 MR. MCGAVIN: That I --

11 THE COURT: That's all you have? All you have is
12 his phone number?

13 MR. MCGAVIN: Right.

14 THE COURT: Okay.

15 MR. HAYSBERT: So, Your Honor, I do want to just
16 make the point that we don't know, based on these responses,
17 whether Lisa Crosby spoke with him, whether Norman Chase
18 spoke with him, whether they received information from him.
19 We don't know if they're verifying these responses --
20 apparently, they're not verifying the responses, so --

21 THE COURT: You asked for statements. They don't
22 have a statement from them. I don't know what other
23 information there is, but you have contact information you
24 can reach out and try and speak to. They apparently have not
25 had any luck. It sounds like you may have had a little more

1 luck. We'll wait and see what the private investigator says.

2 MR. HAYSBERT: Well, with respect to Tristal, she,
3 from what we have been able to gather, was responsible for
4 creating the claim.

5 THE COURT: I understand that.

6 So there are photographs? You've already produced
7 photographs of what the floor looked like? I'm looking at
8 Request No. 22. It says there are two photographs taken of
9 the floor and the footwear of the plaintiff, so these have
10 been produced?

11 MR. MCGAVIN: Right, yes.

12 MR. HAYSBERT: Your Honor, we -- we included a whole
13 section in our motion to compel on this part.

14 The two photographs did not have the information
15 he's requesting from me, the original metadata. We don't
16 know if they came from a camera or whether or not they came
17 from a video, spliced into a photograph. We have no idea --

18 THE COURT: Do you know whether the electronic
19 native images of these photographs still exist, Mr. McGavin?

20 MR. MCGAVIN: I don't know, Your Honor, no.

21 THE COURT: If they do -- if they do, if the native
22 images still exist, if they're saved on someone's hard drive
23 somewhere, these two photographs, I'm going to order that you
24 produce them in native format to Mr. Haysbert.

25 MR. MCGAVIN: Okay.

1 MR. HAYSBERT: Just photographing a piece of floor,
2 there's not even a date of when they --

3 THE COURT: They took a picture of your client's
4 shoes. I mean, are you disputing that they're her shoes?

5 MR. HAYSBERT: We're disputing that they took a
6 picture of the shoes. We're disputing the fact of where they
7 took the picture. How did they take the picture of it? What
8 happened -- I mean --

9 THE COURT: Does your client know? I mean, does
10 your client dispute that they're her shoes?

11 MR. HAYSBERT: So what she does dispute is that
12 there was anyone behind her taking a picture --

13 THE COURT: No, no, Mr. Haysbert, that's not my
14 question. You can argue all you want, but I'm asking the
15 question.

16 Does your mother look at those shoes and say, "Those
17 are not my shoes"?

18 MR. HAYSBERT: We produced pictures of the shoes
19 pursuant to the discovery request above for the shoes.

20 THE COURT: Were these photographs produced by
21 Outback? Are they photographs taken on the day --

22 MR. HAYSBERT: No. There was one paragraph produced
23 by Outback of what they're describing as her shoes, but they
24 didn't even describe it fully. They said, this is the
25 footwear of the plaintiff. Here's one photograph of her --

1 THE COURT: Mr. Haysbert, I don't know why this is
2 difficult.

3 MR. HAYSBERT: It's not difficult.

4 THE COURT: Well, then, why won't you answer my
5 question?

6 Does the photograph that they produced depict your
7 mother's -- I mean, your client's shoes? Does it or does it
8 not?

9 MR. HAYSBERT: Judge, how can I answer that
10 question? We don't know the date --

11 THE COURT: It's a simple question.

12 MR. HAYSBERT: No, we don't know the date.

13 THE COURT: Have you shown the photograph to your
14 client and asked, "Are these your shoes?"

15 MR. HAYSBERT: The photograph -- I mean, can we pull
16 up the photograph?

17 THE COURT: No, I don't want -- I asked you a
18 question. Have you shown the photograph to your client?

19 MR. HAYSBERT: I have shown the photograph to my
20 client, Your Honor, and --

21 THE COURT: Does she believe that it depicts her
22 shoes?

23 MR. HAYSBERT: You can't even really tell --

24 THE COURT: I didn't ask what you can tell, I asked
25 whether she thinks it shows her shoes.

1 MR. HAYSBERT: Your Honor, I wouldn't -- I wouldn't
2 be able to provide you that information, because I don't know
3 when that photograph was taken, by who --

4 THE COURT: Mr. McKelvey, Mr. Haysbert will not
5 answer my question.

6 Do you know, Mr. McKelvey, whether your client
7 believes this photograph depicts her shoes or not?

8 MR. MCKELVEY: I do not know one way or the other.

9 THE COURT: All right. I'm going to move on. I'm
10 not ordering any other responses to the request other than
11 the ones that I've already described.

12 MR. HAYSBERT: So we will be getting the metadata of
13 the --

14 THE COURT: Oh, no, I did order that. I did order
15 that. If the metadata exists, if the photographs exist in
16 native format, I'm requiring Mr. McGavin to turn them over.

17 MR. HAYSBERT: And, Your Honor, part of that is
18 where the -- it's a black and white, essentially, photo of a
19 person looking at their feet. It doesn't clearly show
20 anything, and because you're not looking at it now I can't
21 fully describe it for you.

22 THE COURT: I don't need to have it fully described.
23 I've made a ruling. I've ordered him to produce the native
24 image, if it exists.

25 I didn't know there were photographs. I mean, I

1 didn't know -- I thought you were just being asked to take
2 Mr. McGavin's word for the fact that the floor was clean and
3 dry, but there's apparently a photograph of the floor that
4 you disbelieve, so that just changes the tenor in my mind.

5 MR. HAYSBERT: Not that I disbelieve. There's a
6 photograph of a brown square. It has no -- there's no
7 context to it. It doesn't show that it's inside of a
8 building. It could be someone putting a brown piece of
9 square wood on a piece of paper and taking a picture of it.
10 The same thing with the --

11 THE COURT: All right. I don't need any more
12 argument on --

13 MR. HAYSBERT: The same thing with the --

14 THE COURT: I don't need any more argument on it,
15 Mr. Haysbert.

16 MR. HAYSBERT: Sure.

17 (There was a pause in the proceedings.)

18 THE COURT: Just for the record, I'm reading through
19 Document No. 41-2, the last exhibit, which are the specific
20 objections, responses, and motions to compel with respect to
21 requests for admission.

22 (There was a pause in the proceedings.)

23 MR. HAYSBERT: This appeared to be missing in my
24 earlier read-through, Your Honor, but I've found that Request
25 for Admission No. 23 that provides the contradiction.

1 THE COURT: Yes, that does appear to conflict with
2 your earlier supplemental response, so do you need to amend
3 that response, Mr. McGavin? You had said that you do not
4 require -- or you denied that you required employees to wear
5 nonslip footwear, and then you supplemented, so do you need
6 to amend Response No. 23?

7 MR. MCGAVIN: Sure.

8 THE COURT: Okay. I'm going to direct that you file
9 any supplemental response to Request No. 23 within 14 days.

10 Okay. I think that takes care of it. I didn't see
11 any other basis to order a supplemental response to the
12 request for admission. Again, it goes back to a number of
13 the points that you raised in your written spreadsheet
14 related to the definition of "condition." And I understand
15 you-all disagree about that. Maybe you think that a
16 different response is warranted, but I have looked at the
17 objections, and based on my understanding of the phrasing of
18 the requests for admission, the objections and responses are
19 proper as to those requests that have incorporated the term
20 "condition" or asked either of the defendants to admit
21 knowledge, responsibility, et cetera, for "the condition," as
22 it's defined in those requests for admission, so I'm not
23 ordering any supplemental response to any of the other
24 requests for admission.

25 Okay. So that takes care of the last motion to

1 compel. As I said, I've ordered the responses that I've
2 ordered within 14 days. I'll look also for your supplemental
3 submissions on the pending motion for sanctions. I will be
4 writing an R&R on the motion for leave to amend and motion to
5 remand, and you'll probably have that in the same time frame
6 that I receive your objections.

7 I'm also directing you all to promptly meet and
8 confer regarding deposition dates, and I've extended the
9 discovery deadline 60 days, as outlined, and will communicate
10 with the District Judge regarding the impact of those
11 decisions on the presently scheduled trial date.

12 Okay. Mr. Haysbert, is there anything else we need
13 to take up today?

14 MR. HAYSBERT: No, I think that's all, Your Honor.
15 I would defer to Mr. McKelvey.

16 THE COURT: Mr. McKelvey, do you have anything else?

17 MR. MCKELVEY: No, Your Honor, not at this point.

18 THE COURT: Mr. McGavin, anything else we need to
19 take up for either of the defendants?

20 MR. MCGAVIN: No, thank you, Your Honor.

21 THE COURT: All right. Look, I know this is a
22 difficult case, and you-all have struggled to get this
23 discovery accomplished. I really want to encourage both
24 sides to continue trying to cooperate and do the best you can
25 to work these things out without court intervention. If it's

1 impossible to do that, we'll be available to assist you
2 further, but I hope that the guidance that you've gotten
3 today and the Court's comments and orders with respect to
4 these pending motions will be helpful in getting the case
5 moving forward on a track so that it's ready for resolution
6 at some point, all right?

7 MR. MCGAVIN: Thank you, Your Honor.

8 THE COURT: All right. Thank you all.

9 MR. HAYSBERT: Thank you, Your Honor.

10 THE COURT: Court will be in recess.

11 (The hearing adjourned at 12:51 p.m.)
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CERTIFICATION

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

/s

Heidi L. Jeffreys

April 6, 2021

Date

Heidi L. Jeffreys, Official Court Reporter